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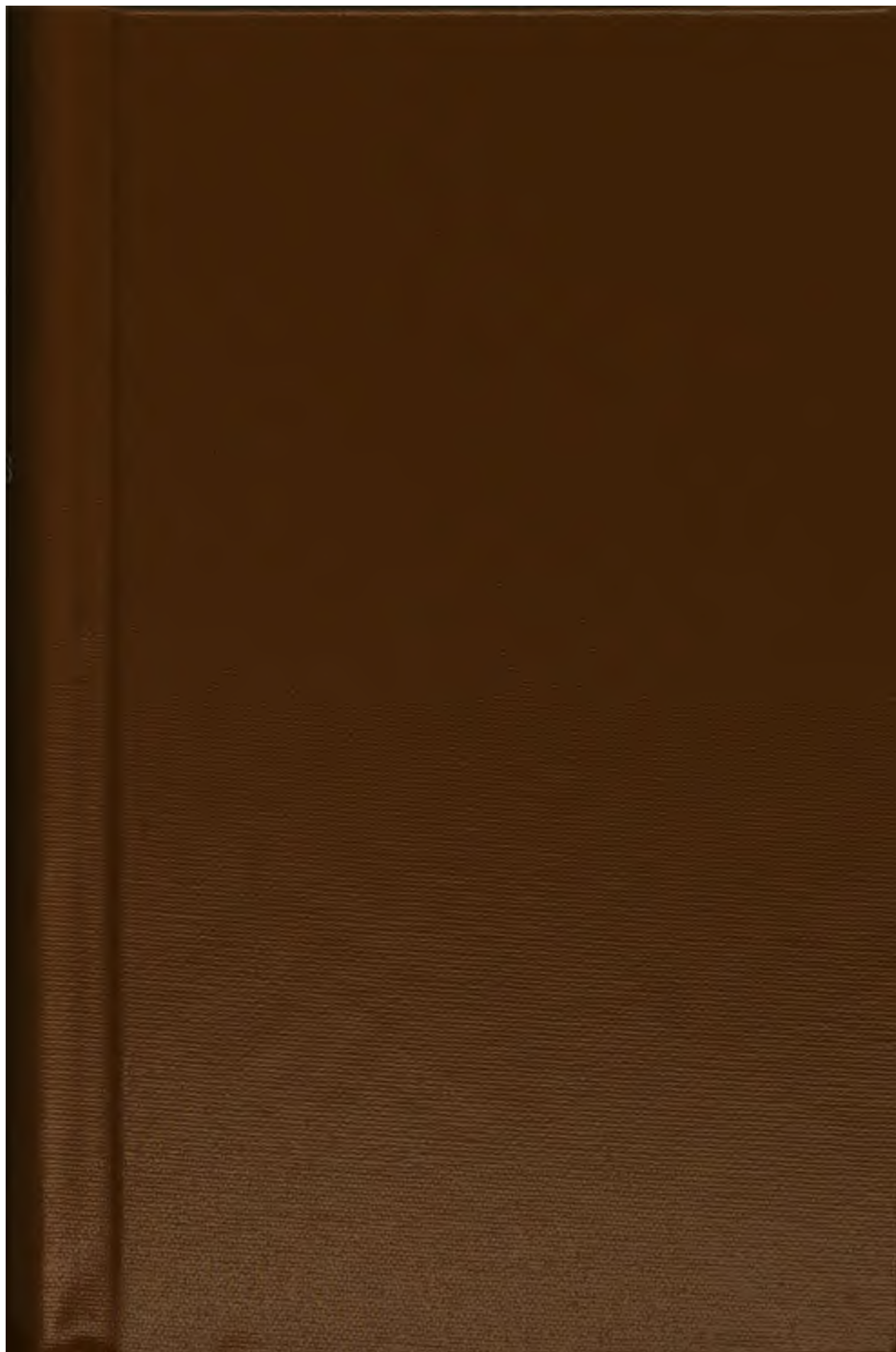
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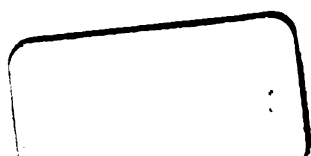
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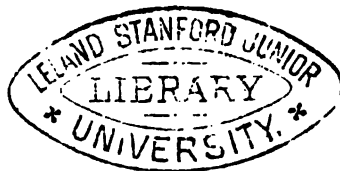
THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY
WILLIAM M. MCKINNEY.

VOLUME LVI.

NORTHPORT, LONG ISLAND, N. Y.
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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

VOL. LVL

ILWACO RAILROAD & NAVIGATION CO.

v.

OREGON SHORT LINE & UTAH NORTHERN R. CO.

(U. S. Circuit Court of Appeals, 9th Circuit, July 17, 1898, 57 Fed. Rep. 678.)

Interstate Commerce Act—Discrimination against Competing Line—Steamboat Wharf.—A transportation company operating connecting railroad and steamship lines is not required by the Interstate Commerce Act to allow the steamboats of a competing line to land at its wharf, since the steamboat and railroad lines belonging to the said company cannot be construed as connecting lines under the said act.

APPEAL from the Circuit Court of the United States for the western division of the District of Washington.

In Equity.

The decision of the circuit court is reported in 50 Am. & Eng. R. Cas. 554.

Thomas N. Strong (*C. W. Fulton* and *O. A. Dolph*, on the brief), for appellant.

W. W. Cotton (*Zera Snow*, on the brief), for appellee.

McKENNA, Circuit Court Judge.—The plaintiff contends that defendant, by preventing it from landing its boats at a wharf owned and used by the defendant, discriminates against it, contrary to section 3 of the Interstate Commerce Act.

The facts are as follows: That prior to the month of August, 1888, the defendant was named the Ilwaco Steam Navigation

Company, but in that month it filed supplemental articles of incorporation, changing its name to Ilwaco Railway & Navigation Company, and proceeded to construct a line of railway from a point at or near the town of Ilwaco on the Pacific Ocean, in the state of Washington, to a point on the navigable waters of Shoal Water Bay, in Pacific county. That the construction of said railway was commenced before, but completed after, the filing of said supplemental articles. That prior to the construction of said railroad line the defendant owned and operated a line of steamboats between the town of Astoria, Or., and the town of Ilwaco. That the shores of the Pacific Ocean in that vicinity were popular summer resorts during the months of July and August and the first week of September. That prior to 1888 the Oregon Railway & Navigation Company owned the boats and line between Astoria and Portland, Or., which plaintiff now owns, and carried passengers from Portland to Astoria, which were then transferred to plaintiff's boats, and carried to Ilwaco, from whence they went to the ocean beach in wagons. That in the summer season of the years 1888, 1889, 1890, and 1891 the Oregon Railway & Navigation Company asked and obtained permission to land its passengers on the wharf at Ilwaco, paying a compensation therefor. That complainant only ran its boats during said summer months, and only while people were travelling to said summer resorts. Said town of Portland, Or., is situated on the Willamette River, about 100 miles inland, easterly from the said city of Astoria, which latter city is situated on the left bank of the Columbia River, and about 12 miles inland from the ocean; and the town of Ilwaco is situated on the right bank of the Columbia River, at a part thereof known as "Baker's Bay," and about 15 miles distant, in a northwesterly direction, from said city of Astoria. That in the year 1892 complainant desired the same privileges, but respondent refused.

When defendant constructed its said railway, leading from its said wharf to a point on Shoal Water Bay, it made the said wharf the southern terminus of such line of railway, and there arranged and provided its terminal facilities for its said railway line, and also provided for landing its own boats thereat, but made no provision for landing any other boats; and said wharf ever since has been, and is, the southern terminus, and the principal terminus, of said line, and the principal office of the defendant is at said town of Ilwaco. That when the complainant and its said lessor commenced running its boats during said summer seasons, and continued so doing, as aforesaid, it commenced and continued carrying passengers from said city of Astoria to defendant's said terminus as well, and de-

fendant soon ascertained that its business, instead of increasing, as it should have done, with its additional facilities for accommodating travel on its said railway, and also in new and better boats, which it also constructed and operated, was decreasing, and that it was necessary for it to take some step to protect and increase its business, and to recover its old business. That respondent is able to accommodate all the travel. That there is but one slip or landing-place at said wharf, and defendant was sometimes obliged to moor its boats outside of plaintiff's, and transfer the freight and passengers across the same. That confusion was thereby caused, and the patronage of defendant's boats lessened. That said wharf is constructed at the end of a trestle running out from the shore of the Columbia River thereto, on which trestle is also a wagon road for teams and foot-passengers to travel—safe, secure, and convenient. That said trestle extends over and across the tide land adjacent to the bank of said river, but said trestle and wharf were constructed there by defendant, under a claim of ownership of the said tide land, prior to the date of the admission of the state of Washington, as a state into the Union, and while it was yet a territory of the United States; and said town of Ilwaco is, and during all the times herein stated, since the admission of the state of Washington into the Union, has been, an incorporated town, under the laws of Washington, but the corporation limits thereof extend only to the line of ordinary high tide of said Columbia River. That the harbor lines of the said town of Ilwaco have not yet been located, but the United States government, through its proper officials, is now proceeding to locate the same. That prior to the commencement of this suit, to wit, on the ——— day of ———, 1892, defendant duly applied, in writing, to the state board of equalization of Washington, to have such tide-lands appraised and has duly applied to purchase the same, but no appraisal thereof has been made yet, but defendant has the preferred right to purchase the same, and it intends to avail itself of such right.

That defendant has, during all the time since it constructed said wharf, used it as its own private property, and not as a public wharf, and has refused at all times to allow any other person or persons, firm or corporation, to use it, or share in the use thereof, and has refused at all times to allow any boats, steamers, or craft, excepting its own, to land thereat, except the times when it permitted complainant's boats and said Oregon Railway & Navigation Company's boats to land thereat, as aforesaid, and for the consideration aforesaid paid to defendant, and it is not now permitting, and it never has permitted any other boats than its own, with the exception

hereinbefore stated, to land thereat; and, since the complainant discontinued landing its boats at said wharf, no boats whatever, excepting defendant's own boats, have been allowed or permitted to land thereat. That provision is made at the defendant's terminus for selling tickets, but that this is only for the purpose of supplying persons brought there by defendant's boats, and there is no general or public station there. The regular station, and the first station on defendant's said line of railway, going north, is the one in said town of Ilwaco, aforesaid, at which station the defendant has the usual station facilities and accommodations for receiving passengers and freight. That this station is 4035 feet distant from the wharf. That there is another wharf at said town 1600 feet from defendant's wharf, and 2567 feet distant, over the regularly travelled streets from defendant's station at Ilwaco, at which complainant's boats landed in 1892. That, on its said wharf, defendant leaves cars, when not in use, and whereon it places them to be loaded, and this affords the only terminal facilities which it has. That complainant and defendant are competitors.

On these facts the plaintiff contends that defendant, by excluding the plaintiff's boats from its wharf, offends against section 3 of the act to regulate commerce. It attempts to support this contention by dividing defendant's line, and making its railroad part and its steamboat part connecting lines, as defined in said section 3. The first subdivision of the section is as follows: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever."

But is the division of defendant's line justifiable? The parts of the line have not independent ownership. The defendant company was organized for the purpose of constructing a transportation route from Astoria, Or., to Shoal Water bay, Wash. Its means of transportation are steamboats and a railroad. The wharf at Ilwaco makes the connection between them, and the continuity of the route. The act contemplates, we think, independent carriers, capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offend-

No violation of
interstate
commerce act.

ing one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

We do not think that the cases cited by appellee militate with these views, nor do they justify a railroad company combining with its proper business a business not cognate to it, and discriminating in favor of itself, as it might in counsel's illustration of a combination of a railroad company with the Standard Oil Company, or as illustrated in the cases of *Baxendale v. Great Western Ky. Co.*, 1 *Railway & Canal Traffic Cas.* 202; *Same v. London & S. W. Ry. Co.*, *Id.* 231; and *Parkinson v. Railway Co.*, *Id.* 280. In all these cases the railroad company attempted to discriminate in favor of itself as carrier, separate from its capacity as a railway carrier. We find no difficulty of concurring in these cases, and distinguishing them from the case at bar. It was not to engage in the business of drayman, as *COCKBURN, C.J.*, indicates in the first case, that great powers have been given to railway companies, and, if permitted to be so used, might indeed be converted into a means of very grievous oppression. The principle of these cases does not extend to boats owned by railroads, as a part of a continuous line. Nor do we think the case, *Indian River Steamboat Co. v. East Coast Transp. Co. (Fla.)*, 49 *Am. & Eng. R. Cas.* 212, sustains complainant. It was a case of discrimination. The action was between two competing steamboat companies, in favor of one of which a railroad company had discriminated by leasing its wharf. Both companies were independent of the railroad, and both connecting lines with it. But the court recognized the right of the railroad company and the Indian River Company to build and maintain a wharf, as incidental to their business, saying: "If either company should erect a dock or wharf for its private use, we know of no law to prohibit it." Page 492. The steamboats were competing lines, and the statutes of Florida regulating railroads provided that no common carriers subject to the provisions should "make any unjust discrimination in the receiving of freight from or the delivery of freight to any competing lines of steamboats in this state." The decision, therefore, was sustained by the laws of the state. The reasoning of the court, beyond this, seems to be in conflict with the *Express Cases* decided by the Supreme Court of the United States. 117 *U. S.* 29, 23 *Am. & Eng. R. Cas.* 545.

It is not clear what complainant claims from the second subdivision of section 3, besides what it claims from the first subdivision. The second subdivision is as follows: "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic be-

tween their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracts or terminal facilities to another carrier engaged in like business."

The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion, however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate our views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist.

Judgment reversed, and cause remanded for further proceedings.

Railroad Wharves—Right to Exclude Boats of Competing Company.—See *Indian River Steamboat Co. v. East Coast Transp. Co. (Fla.)*, 49 Am. & Eng. R. Cas. 212; *Oregon S. L. & U. N. R. Co. v. Ilwaco R. & N. Co. (C. C.)*, 50 Am. & Eng. R. Cas. 554.

UNITED STATES

v.

TRANS-MISSOURI FREIGHT ASSOCIATION *et al.*

(*U. S. Circuit Court of Appeals, 8th Circuit, October, 2, 1893, 58 Fed. Rep. 58.*)

Anti-trust Act—Contracts to which the Act Applies—Terms Defined.—The Act of Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which declares that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," is illegal, cannot be construed as prohibiting every contract or combination between competing railroad companies which in any manner restricts free competition, since the test of the validity of such a contract or combination is not the existence, but the reasonableness, of the restriction imposed; and this decision has especial force in view of the Interstate Commerce Act.

Same—Contracts between Competing Lines—Traffic Association—Interstate Commerce.—A contract between several transportation companies, forming a traffic association, alleged to be in violation of the Anti-trust Act, stated that the association was formed for "mutual protection by establishing and maintaining reasonable rates, rules and regulations, both through and local;" that competition between the members should be governed by the association; that there should be regular monthly meetings, in which

each company must be represented by some authorized officer ; that a committee should be appointed to establish rates, etc., and that these should be put into effect; that any member might give five days' written notice, prior to any monthly meeting, of any proposed reduction of rates or change of rules; that thereupon the reduction or change should be considered by the association at the next meeting, and that all members should be bound by the decision, unless a written notice should be given that, within ten days thereafter, the party so notifying the association intended to make such modification, notwithstanding the decision of the association ; that any member might, without notice, at its peril make any rate, rule or regulation necessary to meet the competition of outside lines, subject to a fine if the association decided that the reduction was not necessary; that all arrangements with connecting lines should be made by authority of the association, and that the chairman should punish violation to the agreement by fines. The chairman was made the executive officer of the association, and was required to enforce the provisions of the contract. Under-billing or billing under a wrong classification was prohibited. Provision was made for arbitration in case of the disagreement of the parties. It was provided that any member might withdraw from the association on thirty days' notice. *Held*, that, if the Anti-trust Act applied to and governed interstate and national transportation and its instrumentalities, neither this contract nor the association formed under it fell within the inhibitions of the said act.

SHIRAS, J., *dissenting*.

APPEAL from United States Circuit Court for the district of Kansas.

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and 18 railroad companies, under the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-trust Act" (26 Stat. 209, c. 647; Rev. St. Supp. 762), to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they

were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fé Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article 1.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows: 1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico on the 95th meridian; thence north to the Red River; thence via that river to the eastern boundary-line of the Indian territory; thence north by said boundary-line and the eastern line of the state of Kansas to the Missouri River, at Kansas City; thence via the said Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary-line to the international line—the foregoing to be known as the 'Missouri River line'; thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico, and thence via said gulf to the point of beginning, including business between points on the boundary-line as described. 2. All

freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri River line.

"Exceptions.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A. T. & S. F. between Pueblo and Cañon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver & Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi River points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi River and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri River points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"Article II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification,

notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon the other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if though advisable by them be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no

vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll-call of general or special meeting of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

" Article III.

"The duties and powers of the chairman shall be as follows :

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines, as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all way-bills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances ; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3 of article 3 of the agreement.

" Article IV.

"Any wilful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any wilful violation of them shall be subject to the penalties provided herein.

" Article V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

" Article VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall ap-

prove the appointment and salaries of necessary employés, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

" Article VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association; provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

" Article VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defence in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce" (24 Stat. 379, c. 104; Rev.

St. Supp. 529), and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers ; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there ; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land-grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and changed by the association thus formed, and that they have complied with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the act of Congress of February 4, 1887, entitled, " An act to regulate commerce," and the acts amendatory thereof. They aver that under that act they were required to make all charges reasonable and

just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the interstate commerce commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the interstate commerce commission under the act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the interstate commerce act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440, 51 Am. & Eng. R. Cas. 458.

J. W. Ady, for appellant.

George R. Peck and *Joel F. Vaile* (*A. L. Williams, N. H. Loomis, R. W. Blair, John M. Thurston, O. M. Spencer, O. A. Mosman, J. D. Strong, and W. F. Guthrie*, on the briefs), for appellees.

SANBORN, J. — Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition—they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their main purpose. When acting independently, the spur of self-interest drives each corporation

Pooling contracts.

to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 Congress recognized and adopted this rule of public policy, and by section 5 of "An act to regulate commerce," commonly called the "Interstate Commerce Act" (24 Stat. 379, c. 104; Rev. St. Supp. 529), prohibited such contracts between common carriers engaged in interstate or international commerce. That act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Anti-trust Act" (26 Stat. 209, c. 647; Rev. St. Supp. 762), Congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Section 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

The government bases this suit on these provisions of the latter act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free lines of railroad; second, because it tends to create a monopoly; and, third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public. The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influ-

Grounds of
the suit.

ence on the transportation system of the nation. The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the interstate commerce act; but it insists that the anti-trust act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the anti-trust act prohibits any contract between competing railroad companies that restricts competition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade," and illegal within the meaning of the anti-trust act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that act? and, if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the anti-trust act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this act, but the terms are not new. For more than 200 years before it was passed, the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the Supreme Court of the United States. *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 25 Am. & Eng. Corp. Cas. 369; *Fowle v. Park*, 131 U. S. 88. Two years before its passage Congress had enacted the interstate commerce law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation.

Under these circumstances, three well-settled rules of construction must be applied to ascertain the meaning and scope of the act: (1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act. (2) Where words

Rules of construction.

have acquired a well-understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears. (3) Where Congress creates an offence, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offence, for the definition of the offence if it is not clearly defined in the act adopting or creating it. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198; *In re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 1 Black, 459, 469; *McDonald v. Hovey*, 110 U. S. 619, 628.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this act was passed to determine what contracts in restraint of trade were then illegal; for it is clear both from the rules to which we have referred and from the title of the act, viz., "An act to protect trade and commerce against unlawful restraints and monopolies," that it was such contracts, and such contracts only, that Congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice BURROUGH in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not

Unlawful restraints of trade under the common law.

use his art within the time limited. HULL, J., said: "In my opinion you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common-law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 1841, Lord LANGDALE, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whittaker v. Howe*, 3 Beav. 383. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practising was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallan v. May*, 11 Mees. & W. 652, 667. In 1869, Vice-Chancellor JAMES sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Cloth Co. v. Lorsont*, L. R. 9 Eq. 345. In 1889 the Supreme Court of New York sustained a contract not to manufacture or sell thermometers or storm-glasses throughout the United States for 10 years. *Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Company the exclusive right to furnish all drawing-room and sleeping-cars required by that road during a period of 15 years was not an illegal restraint of trade, and sustained it. *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 47 Am. & Eng. R. Cas. 424. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal v. Girard's Ex'rs*, 2 How. 127, 197; *Swann v. Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the

people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent non-members from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire-cloth Co. v. New Jersey Wire-cloth Co.* (Com. Pl. N. Y.), 14 N. Y. Supp. 277, "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348.) "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9. "Whatever destroys, or even restricts, competition in trade is injurious if not fatal to it." *Hooker v. Vandewater*, 4 Denio, 349, 353.

A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other

ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co. v. Hayes*, 76 Cal. 387; *De Witt Wire-cloth Co. v. New Jersey Wire-cloth Co.* (Com. Pl. N. Y.), 14 N. Y. Supp. 277; *Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Anderson v. Jett* (Ky.), 12 S. W. Rep. 670; *Gibbs v. Gas Co.*, 130 U. S. 396, 25 Am. & Eng. Corp. Cas. 369; *Morrill v. Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled non-members to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, and *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were *ultra vires* the corporations, and their purpose and effect was to monopolize trade, like *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; or cases of questionable authority, like *Com. v. Carlisle*, Brightly, N. P. 36, 39. See, *contra*, *Snow v. Wheeler*, 113 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Rutherford*, 106 Mass. 1, 14. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well-settled rules, and come within the well-defined class, to which we have above referred.

A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competition from illegal contracts in restraint of trade. The decision in

the leading case upon this subject (*Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. (7th Amer. ed.) pt. 2, p. 708), the case which Chief Justice Distinction between legal and illegal contracts. FULLER says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade (*Gibbs v. Gas Co.*, 130 U. S. 409, 25 Am. & Eng. Corp Cas. 369) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews, Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. Chief Justice PARKER, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice PARKER, that contracts in general restraint of trade are illegal, —a remark that was not necessary to the determination of the question before him,—has been, to say the least, greatly modified by subsequent decisions.

There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis v. Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general post-office, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea-trade, and securing that trade to themselves. They accomplished this pur-

pose by allowing a rebate of 5 per cent on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea-carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restriction upon free competition, Lord COLERIDGE held that the association was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal (23 Q. B. Div. 598), and finally affirmed by the House of Lords (App. Cas. 1892, p. 25).

In *Perkins v. Lyman*, 9 Mass. 522, the Supreme Judicial Court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Match Co. v. Roeber*, 106 N. Y. 473, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Navigation Co. v. Winsor*, 20 Wall. 64, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia River and its tributaries, respectively, was declared by the supreme court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for 10 years. And in 1890 the Supreme Court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling-stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by non-competing companies. *Manchester, etc., R. Co. v. Concord R. Co.* (N. H.), 47 Am. & Eng. R. Cas. 359. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle v. Park*, 131 U. S. 88, 97; *Gibbs v. Gas Co.*, 130 U. S. 396, 25 Am. & Eng. Corp. Cas. 369; *In re Greene*, 52 Fed. Rep. 104, 118; *Horner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 363; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345, 354; *Wickens v. Evans*, 3 Yonge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant, Ch. 540; *Mallan v. May*, 11 Mees. & W. 652, 657; *Whittaker*

v. Howe, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pin. 123, 150; *Beal v. Chase*, 31 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389, 5 Am. & Eng. R. Cas. 1; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 94; *Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861; *Association v. Walsh*, 2 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335; *Brown v. Rounsavell*, 78 Ill. 589; *Jones v. Clifford's Ex'r*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are *quasi*-public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 25 Am. & Eng. Corp. Cas. 369; *West Virginia Transp. Co. v. Ohio River Pipe-line Co.*, 22 W. Va. 600, 625; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 16 Am. & Eng. Corp. Cas. 577; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*W. U. Tel. Co. v.*

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American Union Tel. Co.) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe-line Co.* it was held that an owner of 2000 acres of oil-land could not grant to one pipe-line company an exclusive right to lay a pipe-line across said lands, because the legislature, by authorizing pipe-line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a * * * contract with any other gas company whatever."

. No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of

such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Navigation Co. v. Winsor*, 20 Wall. 64; *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 25 Am. & Eng. R. Cas. 425; *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544; *Manchester, etc., R. Co. v. Concord R. Co. (N. H.)*, 20 Atl. Rep. 383; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389, 5 Am. & Eng. R. Cas. 1.

But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the interstate commerce law, and the action that has been taken thereunder by the government commission which was created to enforce its provisions. The interstate commerce law imposel several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy toward merchants and railroad companies exhibited by the common law and by the interstate commerce act. Merchants may refuse to sell their wares at all—they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation (Interstate Commerce Act, § 1); merchants may sell articles of like character and value for as many different prices as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services (*Id.* § 2); merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place (*Id.* § 3); merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensa-

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tion for a short haul than for a long haul (*Id.* § 4); merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules (*Id.* § 6); merchants may change their prices instantly and without notice; railroad companies are prohibited from increasing their rates except after 10 days' public notice, or from decreasing them, except after three days' public notice (*Id.* § 6); merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a commission, established by the government, authorized to take the necessary proceedings for the enforcement of those restrictions (*Id.* § 12). These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an act of Congress three years before the anti-trust act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the interstate commerce commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of Congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate-wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the interstate commerce act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose. In the fourth annual report of the commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations for the purpose of agreeing upon classifications and rates, and upon a great variety

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of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces."

And on page 21 of the same report the following: "In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate-wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the second annual report on page 25, when speaking of the unity of railroad interests, the commission uses this language: "But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 23, we find the following: "A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this: it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the first annual report, on page 33, the commission further said: "To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk-lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced Congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the interstate commerce commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester, etc., R. Co. v. Concord R. Co.*, *supra*. But, without entering into that discussion, it is sufficient to say that, in our judgment, there was no hard and fast rule in force when the anti-trust act was enacted which made every contract between railroad companies void on grounds of

public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the interstate commerce act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to examine the contract which is alleged to be in violation of the anti-trust act, but before doing so a preliminary observation will not be out of place. The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the interstate commerce act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 21 Wall. 430, 437; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 577.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchel v. Reynolds*, *supra*, the unfortunate remark "that wherever such contract *stat indifferenter*, and for

ought appears, may be either good or bad, the law presumes it *prima facie* to be bad," fell from Chief Justice PARKER. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 365; *Stewart v. Transportation Co.*, 17 Minn. 372, 391 (Gil. 348); *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Metc. (Mass.) 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulation, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific Ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association, in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at the next monthly meeting, and all members shall be bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two-thirds vote that the rate, rule, or regu-

Terms of the contract.

lation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employes and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on thirty days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management; for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

Construction
of the con-
tract.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transpor-

tation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the interstate commerce commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the traffic embraced by the agreement, are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the interstate commerce act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate-wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage

that its situation gives it, even under the operation of the agreement. It is much more probable that under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than 10 days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight-rates, such as often upset the business calculations of entire communities, and that this was one of the main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the interstate commerce act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the anti-trust act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for

the bare expenses required to pay its officers and employés. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such a competitor at its peril; but these provisions were necessary for the protection of members of the association against the attacks of non-members. Without such provisions unreasonably low rates established by the latter would draw away the business of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the 15 days' notice in case of a warfare upon it by a non-member.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *In re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union*

Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. Rep. 309, 317-321, 2 C. C. A. 174, 230-235; and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for 40 days unchanged. Practically the 15 representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee, and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a 30-days notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after 15 days' notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the associations shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the government that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the

meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the anti-trust act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the anti-trust act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the interstate commerce act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the anti-trust act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed without costs.

THAYER, district judge, concurs.

SHIRAS, J. (*dissenting*).—I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such non-concurrence.

Assuming that the anti-trust act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed

out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessities of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and enforced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus, in *Gibbs v. Gas Co.*, 130 U. S. 396, 25 Am. & Eng. Corp. Cas. 369, the supreme court, speaking by Mr. Chief Justice FULLER, declared that:

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Registering Co. v. Sampson*, L. R. 19 Eq. 462), yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co. v. Ohio River Pipe-line Co.*, 22 W. Va. 600; *Chicago*

Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 16 Am. & Eng. Corp. Cas. 577; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi*-public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co. v. Ohio River Pipe-line Co.*, 22 W. Va. 600, it is said: "If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 16 Am. & Eng. Corp. Cas. 577, it is declared that, "The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private, corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of

eminent domain—a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfil public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argu-

ment nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market. The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practically the business of the community, whether in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs v. Gas. Co.*, *supra*, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that:

"We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize

their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void."

Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime necessity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which of necessity affects the cost to the consumer, as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the peo-

ple and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the supreme court in *Gibbs v. Gas Co.*, *supra*, are of such a public character that presumably they cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom of contract to combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the interests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into

between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this particular the public has relied upon the effect of competition in keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free

and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intending to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation affording other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railways without placing the welfare of the public in subjection to the interests or supposed interests of those managing the corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained competition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of legislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus estab-

lished, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a carload or two of live-stock or of wheat or other like products. Is the citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him.

If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority, a very full and careful analysis is made of the various provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in

many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying on

of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the interstate commerce act, it is therein argued that this act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The interstate commerce act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common-law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable and not exorbitant compensation for the services rendered by them. The purpose of the interstate commerce act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railway companies, and to force compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the interstate commerce act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there evils of this nature of great magnitude is not to be denied, but the interstate commerce act was not enacted for their eradication.

The primary purpose of that act was to deal with the relations existing between the common carriers and the public,

and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the act was, in the language used by the supreme court in *Railway Co. v. Goodridge*, 149 U. S. 680, 54 Am. & Eng. R. Cas. 423, intended to "cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." The uniformity and equality of rates sought to be secured by that act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the act.

I fail, therefore, to perceive the force of the argument that the adoption of the interstate commerce act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that act the community was certainly entitled to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that act which deprives the public of this safeguard. That act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of business.

In the opinion of the court are found citations from the reports of the interstate commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate-charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised

and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate-wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff-rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law; but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in, does not show that it was the intent of Congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment (whereby either fixed rates or a maximum or minimum limit are enacted by the statute or by provisions for the adoption of rates by a commission), or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to

establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment; has Congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least, were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the interstate commerce act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common-law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the interstate commerce act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that act in the light of the causes leading to its enactment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Con-

gress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the interstate commerce act imposes important restrictions (not upon the right, however), but upon the practice of railway companies to do as they please in the matter of making and altering rates. But how does that fact tend to show that the act places restrictions upon the rights of the public? The Congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that Congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the interstate commerce act, and the action of the commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce, so long as the same are reasonable—which is the position of the court—then would it not follow that the right thus created by the interstate commerce act is abrogated by the later enactment found in the anti-trust act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the interstate commerce act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality.

I cannot believe that such is the meaning of the interstate commerce and the anti-trust acts. When the latter act was adopted, it had been declared by the Supreme Court of the United States to be the law that, with regard to the classes of

business that are of a public nature, and are carried on to meet a public necessity, contracts imposing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such a public character as of necessity places it in the class declared by the supreme court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the anti-trust act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the Supreme Court? The interstate commerce and anti-trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefor lawful. If the natural tendency is to check competition in the matter of rates, and to place a restraint though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that railway companies, by combination between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates; but we know that

the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific Railway Companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying-trade belonging to the business to which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway-line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results; but this is not true of persons engaged in business at non-competitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no competing line.

Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition; and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate non-competitive points are reasonable or not, and the provisions of the interstate commerce act forbidding a greater charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and non-competitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect

of free competition, how fares it with the citizen residing at the non-competitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one

upon the subject of the charges to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus are found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood; and, moreover, it directly affects and controls the cost to the public of the necessities of life.

The declaration found in article I of the contract shows upon its face the main purpose of the combination, it being therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential element in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discrimination for or against particular localities?

But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed intent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case, then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890.

Railway Traffic Associations not Trusts—Construction of Congressional Anti-trust Act.—See note appended to the report of the decision of this case in the circuit court, 51 Am. & Eng. R. Cas. 488.

ATTORNEY-GENERAL

v.

BOSTON & ALBANY R. CO.

(Massachusetts Supreme Judicial Court, Nov. 3, 1893.)

Regulation of Passenger Traffic—Compulsory Issue of Mileage Tickets and Acceptance of Same by Other Railroads—Validity of Statute.—Chapter 389 of Massachusetts Acts of 1892 provides that railroad companies shall sell to all persons applying therefor thousand-mile tickets, at the rate of twenty dollars each, and redeem all such tickets, or any part thereof, upon presentation by any other railroad corporations, and accept from all persons for passage over their own lines all such tickets issued by any other railroad corporations operating lines within the state. *Held*, that the act is void as applying and appropriating individual property to the public use without the owner's consent and without legal provision for a reasonable compensation therefor.

KNOWLTON and HOLMES, JJ., *dissenting*.

REPORT from Suffolk supreme judicial court.

Petitions by the attorney-general against the Boston & Albany Railroad Company and the Old Colony Railroad Company to compel the said companies to comply with St. 1892, c. 389, requiring railroad companies to issue mileage tickets, and to receive those of other roads in payment of fare.

The petitions were as follows:

"Albert E. Pillsbury, attorney-general, in behalf of the commonwealth, informs the court that the Old Colony (or the Boston & Albany) Railroad Company is a railroad corporation established under the laws of the commonwealth, and operating a railroad therein; and that it is required by a law of the commonwealth, being chapter 389 of the Acts of the year 1892, to provide and have on sale for twenty dollars, and to sell to all persons applying therefor, mileage tickets for passenger transportation representing one thousand miles; and to redeem all such tickets, or any part thereof, upon presentation by any other railroad corporation; and to accept and receive from all persons for fare and passage over its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, as therein prescribed. The defendant, though duly demanded, wilfully and wrongfully neglects and refuses to comply in any particular with the requirements of the law as hereinabove set

forth, which wilful and wrongful neglect and refusal has continued from the taking effect of the law until the present time, and declares its purpose and determination not to comply therewith; which conduct is a violation of the law, and of the public right thereunder, for which there is no adequate remedy except by this proceeding. Wherefore the informant prays that the defendant be required and compelled by writ of *mandamus* or other appropriate process, to provide and sell such mileage tickets to all persons applying therefor, and to redeem all such tickets, or any part thereof, on presentation by any other railroad corporation, and to accept and receive from all persons for fare and passage upon all its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, and in all particulars to comply with the requirements of the law as therein set forth, and for such other orders in the premises as justice may require."

The Attorney-General, *pro se*.

J. H. Benton, Jr., for defendant Old Colony R. Co.

S. Hoar and W. Hudson, for defendant Boston & A. R. Co.

FIELD, C.J.—The brief for the Old Colony Railroad Company raises the questions whether the attorney-general has any right to bring the informations, and whether the court has any jurisdiction over the proceedings. It is said that St. 1892, c. 389, does not give the court equity jurisdiction to enforce its provisions, but we do not regard these informations as informations in equity. They are rather petitions for a writ of *mandamus*. See Pub. St. c. 186, § 13. It concerns the public, or an indefinite portion of the public, whether railroad corporations not exempted or excluded by the railroad commissioners shall obey St. 1892, c. 389, and therefore we think that the attorney-general as representing the public can properly institute these proceedings. *Attorney-General v. Boston*, 123 Mass. 460.

At the hearing of the petition against the Old Colony Railroad Company the presiding justice excluded evidence against its objection "tending to prove the allegation of fact in the third, seventh, and eighth paragraphs of its answer." These paragraphs are as follows: "Third. The railroads thus operated by it [the defendant] are in the states of Massachusetts and Rhode Island, and form connecting and continuous lines of interstate transportation and travel, and the regulation of the rates for and the conduct of passenger transportation thereon in this state substantially affect the rates for and the conduct of said interstate transportation

thereon." "Seventh. It says that there are railroad corporations operating railroads in the commonwealth that are not pecuniarily responsible for the redemption and payment of tickets which may be issued by them under chapter 389 of the Acts of the year 1892. Eighth. It says that chapter 389 of the Acts of the year 1892, referred to in said information, is a reduction of its fares and tolls for passenger transportation established by its directors, and of its earnings therefrom, contrary to the provisions of its charter, and is not a revision or alteration of its fares and tolls in the manner prescribed thereby, or by the general law relating to railroad corporations."

St. 1892, c. 389, can, we think, be construed as relating only to fares for the transportation of passengers from one point to another within the commonwealth; and if under the existing regulations of the railroad company, there may be some difficulty in applying the law when a passenger intends to proceed from or to a point within the commonwealth to or from a point outside of the commonwealth, we do not see that this difficulty is inherent in the subject, or that by proper regulations the fares of passengers for transportation within the commonwealth cannot be paid for by mileage tickets, although the passengers are travelling to or from a place beyond the limits of the commonwealth. It is no sufficient objection to the statute that it may incidentally affect commerce between the states, if it does not attempt to regulate such commerce. See *Louisville, N. O. & T. Ry. Co. v. State of Mississippi*, 133 U. S. 587, 41 Am. & Eng. R. Cas. 36.

Application of
the act.

The averments of the seventh paragraph relate to a possibility, rather than a fact, because it is not alleged that any railroad corporations which are not pecuniarily responsible have issued any mileage tickets under St. 1892, c. 389, or that all such corporations have not been excluded from the provisions of the statute by the railroad commissioners. It is, in effect, an argument by way of an example of what might happen if one railroad company is required to transport passengers on the credit of another. The constitutionality of the statute cannot depend upon the solvency or insolvency of any particular railroad company at any particular time.

The averments of the eighth paragraph are not to the effect that St. 1892, c. 389, will, if carried into effect, operate to reduce the fares for passenger transportation below what is reasonable, but only that the statute will cause a reduction contrary to the provisions of the charter of the defendant.

Regulation of
rates—Implied
repeal of old
charters.

The Old Colony Railroad Company is a corporation in this

commonwealth and in the state of Rhode Island, formed by the union of various railroad corporations chartered by this commonwealth or by the state of Rhode Island, and is also the lessee of the Boston & Providence Railroad Corporation and of other railroad corporations. The earliest charter of any of the railroads leased is that of the Boston & Providence Railroad Corporation, which was approved June 22, 1831. The earliest charter of any of the railroads which make up this defendant corporation is that of the Taunton Branch Railroad Corporation, which was approved April 7, 1835, being St. 1835, c. 131. The fourth section of this last-named statute contains the provision "that the legislature shall not at any time so reduce the tolls and their profits as to produce less than ten per cent per annum upon the capital stock paid as aforesaid without the consent of said corporation." The charters of other railroads which have been united to form the Old Colony Railroad Company contain similar provisions. These charters also grant to the corporations the right to take tolls at such rates as may be established by the directors.

Similar provisions were enacted in the Revised Statutes (Rev. St. ch. 39, § 83) and in the General Statutes (Gen. St. ch. 63, § 112). St. 1870, ch. 325, § 1, repealed Gen. St. ch. 63, § 112, and provided as follows: "Any railroad corporation may establish for its sole benefit, fares, tolls, and charges, upon all passengers and property, conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road: provided, that such rates of fares, tolls, and charges, and regulations shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad corporation to the contrary notwithstanding." St. 1874, ch. 372, § 4, is as follows: "Railroad corporations heretofore established in this commonwealth, whether by special act or in conformity with the provisions of the general law passed in the year one thousand eight hundred and seventy-two, shall have the powers and privileges and be subject to the duties, liabilities, restrictions, and other provisions contained in this act: which, so far as inconsistent with charters granted since the eleventh day of March, one thousand eight hundred and thirty-one, shall be deemed and taken to be in alteration and amendment thereof: provided, that nothing herein contained shall be construed to impair the validity of any special power heretofore conferred by charter or other special act upon any particular railroad corporation which has already exercised

such power or to prevent the continued exercise thereof, conformably, so far as may be, to the provisions of this act; nor shall anything herein contained affect any act done or any right accruing, accrued, or established, or any proceedings, doings, or acts ratified or confirmed, or any suit or proceeding had or commenced in any case before the act takes effect," etc. Section 179 of this statute is as follows: "Any railroad corporation may establish its sole benefit fares, tolls, and charges upon all passengers and property, conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road: provided, that such rates of fares, tolls, and charges, and regulations, shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad to the contrary notwithstanding." These provisions were re-enacted in Pub. St. ch. 112, §§ 2, 180. All the charters involved in these proceedings were granted subsequently to the passage of St. 1831, ch. 81, approved March 11, 1831, which provided "that the acts of incorporation which shall be passed after the passage of this act shall at all times hereafter be liable to be amended, altered, and repealed at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation as to the duration of the same." Rev. St. ch. 44, § 23; Pub. St. ch. 105, § 3.

It is evident that the legislature, in the year 1870, and since, has attempted to repeal the special provisions of the early charters of railroads which purported to limit its right to reduce fares or tolls below 10 per cent of the cost of the roads. An examination of the statutes will show that since the year 1870 the Old Colony Railroad Company has accepted the benefit of legislation "subject to all general laws which now are or hereafter may be in force relating to railroad corporations." One instance mentioned in the brief of this company is the union of the company with the Boston, Clinton, Fitchburg & New Bedford Railroad Company, pursuant to St. 1882, ch. 80. The Boston, Clinton, Fitchburg & New Bedford Railroad Company was formed by the union of the other railroads. The Agricultural Branch Railroad Company was incorporated by St. 1847, ch. 269, and was subject "to all the duties, liabilities, and restrictions set forth in the forty-fourth chapter of the Revised Statutes, and in that part of the thirty-ninth chapter of the Revised Statutes relating to railroad corporations, and in the public statutes which have been or may

be passed, relating to railroad corporations." The name of this railroad company was by chapter 153, St. 1867, changed to the Boston, Clinton & Fitchburg Railroad Company. The New Bedford Railroad Company was incorporated by St. 1873, ch. 20, "subject to all the restrictions, duties, and liabilities set forth in all the general laws which now are, or hereafter may be, in force relating to railroad corporations," and this company, after it had purchased or united with the Taunton Branch Railroad Company, was authorized to unite "with the corporation that may be formed by the union of the Mansfield & Framingham Railroad Company with the Boston, Clinton & Fitchburg Railroad Company."

None of these charters contains any provision that the tolls should not be reduced by the legislature below 10 per cent of the cost of the roads, or any provisions on the subject. It may at some time deserve consideration whether, when a railroad voluntarily unites with other railroads, and there are special provisions concerning tolls in some of the charters and none in others, and the union is effected under a statute which provides that the corporation thus formed shall be subject to all general laws which now are or hereafter may be in force relating to railroad corporations, these special provisions continue in force, and are applicable to the consolidated corporation. In view of the many changes in the charters of nearly all the railroad corporations of the commonwealth occurring since 1870, which have been accepted by the corporations, it may well raise a doubt whether these corporations have not consented to be subject to any laws which the legislature under its general powers may constitutionally enact concerning fares or tolls. But whether these special provisions can be regarded as still in force, and, if so, whether they could be repealed by the legislature without the consent of the corporation, under the power reserved to amend, alter, or repeal the charters, we have not found it necessary to determine in the present cases.

It is argued by both defendants that the statute is in violation of the provision of the constitution of the United States, article 1, § 10, that "no state shall * * * make anything but gold and silver coin a tender in payment of debts." The meaning of the statute is, we think, that the delivery of a mileage ticket shall discharge the passenger from liability to the railroad for his transportation, but that the railroad issuing the ticket shall be liable to pay to the railroad transporting him, in lawful money, the statutory price of the ticket or part of a ticket which the passenger has surrendered. The intention is that the railroad performing the service

Validity under
United States
constitution.

shall ultimately be paid the statutory fare in lawful money, not that the ticket of itself shall be a legal tender. If the legislature cannot constitutionally require a railroad company to transport a passenger unless the fare is paid in advance, we have no doubt that the delivery of a mileage ticket issued by another corporation is not of itself a payment of the fare. We assume, however, in favor of the commonwealth, without deciding or expressing any opinion upon it, that it is not absolutely necessary that the fare of a passenger on a railroad be paid in advance in money.

There remain to be considered the objections of both defendants that the statute establishes a uniform rate per mile, and requires one railroad company to transport a passenger upon the credit of another; that the conditions affecting the transportation imposed by the road which issues the tickets must be performed by any other road to which the ticket is presented, unless the road is exempted or excluded from the provisions of the statute; and that authority is given to the railroad commissioners to exempt or exclude from the provisions of the statute any railroad if, in their judgment the public welfare or the financial condition of the road requires or demands it. The legislature has prescribed the rate of fare per mile, but has not undertaken to prescribe in other respects the form of contract which each railroad may make for the transportation of passengers. It has not adopted a standard form of contract, as it has done, for example, with reference to fire-insurance policies. Pub. St. c. 119, § 139. One company may permit no baggage of any kind to be carried with the passenger on a mileage ticket, and another company may permit personal baggage or any baggage to an amount not exceeding 100 or 1000 pounds in weight; and according to the terms of the first section of the statute one railroad must, on the presentation of a mileage ticket issued by another, perform the conditions of the contract as issued by the other. The power of the legislature of a state to prescribe the charge or the maximum charge to be made for the use of property "affected with the public interest" was first elaborately considered by the Supreme Court of the United States in what are called the "Granger Cases." *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, *Id.* 155; *Peik v. Railway Co.*, *Id.* 164; *Railroad Co. v. Ackley*, *Id.* 179; *Railroad Co. v. Blake*, *Id.* 180; *Stone v. Wisconsin*, *Id.* 181. Whatever difference of opinion there may have been among the justices of that court concerning the tests which determine whether property is affected with a public interest, there is no doubt that the property of railroad cor-

One railroad required to carry passengers upon credit of another.

porations which have been invested by the legislature with the right of eminent domain, and are common carriers of persons or merchandise, is property "devoted to a public use." See *Railway Co. v. Wellman*, 143 U. S. 339, 49 Am. & Eng. R. Cas. 1; and *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31.

The justices of the Supreme Court of the United States perhaps differ in opinion whether there can be any judicial interference with the rates for railroad transportation established by the legislature of a state on the ground that they are not reasonable, but they agree that the property of railroads is property devoted to a public use, and that the legislature may establish rates, or reasonable rates, unless there is an express provision in the charter which forbids it. See *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, and *Budd v. New York*, *supra*. In the railroad commission cases (*Stone v. Trust Co.*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 23 Am. & Eng. R. Cas. 597; *Stone v. New Orleans & N. C. R. Co.*, 116 U. S. 356, 23 Am. & Eng. R. Cas. 606), a majority of the Supreme Court of the United States decided that a grant to a railroad company in its charter of the right to fix and regulate the tolls and charges, substantially such as are contained in the charters of the defendants in the present cases, does not deprive a state of its power to regulate rates. The court says: "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." The court held that a general power given to the corporation to establish rates is not such a contract as restrained the legislature from establishing what it deemed reasonable rates. See *Railroad Co. v. Miller*, 132 U. S. 75. It was also said that, "under pretence of regulating fares and freight, the state cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in the law amounts to a taking of private property for public use without just compensation, or without due process of law." See *Banking Co. v. Smith*, 128 U. S. 174, 35 Am. & Eng. R. Cas. 511; *Dow v. Beidelman*, 125 U. S. 680, 34 Am. & Eng. R. Cas. 322; *Ruggles v. People of Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49.

In *Parker v. Railroad Co.*, 109 Mass. 506, the authority of the legislature of this commonwealth was maintained to fix the rate of toll to be paid by a street-railway company to the East Boston Ferry Company for the carriage of passengers in cars over the ferry. There was a provision in the charter

of the ferry company that the company be allowed to collect and receive such tolls as the mayor and aldermen of Boston should determine, provided that "the rates of ferriage shall never be reduced so much as to reduce the yearly dividends of said company to an amount less than eight per cent on the amount of the capital stock actually invested." The decision is put upon the ground that the statute fixing the rates is an amendment of the charter. The court say: "The power of regulating tolls upon ferries, barges, and turn-pikes has been constantly exercised by the legislature. The great object of such corporations is the accommodation of public travel; and most, if not all, of the charters creating them contain provisions for the regulation of the tolls they are entitled to charge the public. The charter of the East Boston Ferry Company contains such provisions. The legislation in question is not upon a subject foreign to the provisions of the charter or the subject of the grant. It is strictly in alteration or amendment of such provisions, and it is designed to promote the chief object of the grant." It appears from the original papers in this case that the mayor and aldermen of Boston had fixed rates of toll over the ferry for foot passengers and for vehicles, but none expressly for horse cars, and that the rates fixed for foot passengers were twice or three times as much as those fixed in the statute for passengers in the horse cars. It also appeared that the established rates of toll were not sufficient to enable the company to pay "any dividends on the capital stock actually invested." The court did not, however, expressly consider whether the provision of the charter that the tolls should not be reduced "to an amount less than eight per cent on the amount of capital stock actually invested" constituted a contract which could not be avoided except by a repeal of the charter. The statute there considered affected only the rates of toll for passengers in horse cars, leaving untouched all other rates. See *Roxbury v. Railroad Co.*, 6 Cush. 424; *Massachusetts General Hospital v. State Mut. Life Assur. Co.*, 4 Gray, 227; *Fitchburg Railroad Co. v. Grand Junction Railroad Co.*, 4 Allen, 198; *Com. v. Eastern Railroad Co.*, 103 Mass. 254; *Mayor, etc., of Worcester v. Norwich & W. R. Co.*, 109 Mass. 103; *In re Mayor, etc., of City of Northampton (Mass.)*, 33 N. E. Rep. 568.

It is conceded in the present cases, as we understand, that the legislature of a state, unless prevented by some contract, can constitutionally establish reasonable rates of fare for railroad companies within the state, and we regard it as settled that the legislature of a state having a constitution like that of Massachusetts can establish rates of fare for the transportation within the state of passengers and merchan-

dise by railroad companies which are common carriers, unless the state is prevented by some contract with the railroad company; but it is not, however, yet settled what the limitations of this power are—whether it is limited to such rates as a court may deem reasonable, or only to such rates as shall not operate to deprive the railroad companies of their property without just compensation, or without due process of law. It becomes, however, unnecessary at the present time to determine the limitations of this power, because it has not been contended in the present cases that the rates established by the statute are unreasonable. The legislature, if it sees fit, may establish rates for each railroad separately, and, as different railroads may reasonably require different rates, we see no objection to the statute on the ground that certain railroads may be exempted or excluded from its provisions. The subject is one upon which legislation need not be uniform, and the statute cannot be avoided by one railroad company because it is not applied to another. *In re Mayor, etc., of City of Northampton, ubi supra.* We think that the intention of the statute is that it shall apply to every railroad corporation operating a railroad for the common carriage of passengers within the commonwealth, unless the board of railroad commissioners shall determine on petition, after due hearing, that there is something exceptional in the financial condition of a particular railroad, or in the character of the service it renders to the public, which reasonably requires that railroad to be exempted or excluded from the provisions of the statute, leaving such a railroad to be specially dealt with by the legislature, if it should deem it necessary. We are not satisfied that the statute is unconstitutional on the ground that it contains a delegation of legislative power to the board of railroad commissioners.

The most formidable objections are that the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and one compels one railroad to carry passengers on the credit of another. We have been referred to no judicial decision where any such legislation has been considered. The law governing the taking of private property for public uses affords some analogies which we think are applicable to the present cases. The decisions of this court perhaps go as far as any in permitting an entry upon land and an occupation of it for the purpose of taking it for public uses before reasonable compensation has been actually made, and in not requiring that an adequate fund for compensation be set apart before the entry and occupation. Still there must be an adequate provision for com-

Authorizing
one company
to impose con-
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another.

pensation, and a provision that the land should be paid for out of the earnings of a railroad which was owned by the commonwealth was held not to be adequate, although it was probable that such earnings would be sufficient. *Connecticut River Railroad Co. v. County Com'rs*, 127 Mass. 50. But in the case of land, if the landowner takes proper measures to have the compensation determined, and it is not ultimately paid, a court of equity would enjoin the company taking it from the further use of the land, and the owner could retake the land, or enforce his lien upon it. "The power to take and the obligation to indemnify for the taking are inseparable." *Brickett v. Aqueduct Co.*, 142 Mass. 394; *Drury v. Railroad Co.*, 127 Mass. 571; *Cushman v. Smith*, 34 Me. 247; *Riche v. Water Co.*, 75 Me. 91. The statute authorizing the taking must contain some provision for obtaining adequate indemnity. It is not enough to leave the owner to his action at law for damages. "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay." *Haverhill Bridge Proprietors v. County Com'rs*, 103 Mass. 120; *Thacher v. Bridge Co.*, 18 Pick. 501.

If this is true when the property taken is land, much more is it true when the property taken is consumed in the use, so that, if compensation is not ultimately paid, the owner has no remedy by taking back the property. When property is taken for a public use, and is consumed in the use, the provision for adequate compensation certainly ought to be more than a mere right of action against a private person or corporation with the risk of never obtaining satisfaction; and the compensation, when it is made, must be made in money. *Com. v. Peters*, 2 Mass. 125; *State v. Beackmo*, 8 Blackf. 246; *Butler v. Commissioners*, 39 N. J. Law, 665; *Vanhorne v. Dorrance*, 2 Dall. 304; *Cooley*, Const. Lim. (6th ed.), pp. 691, 694; *Lewis*, Em. Dom. § 460. Under the statute of this commonwealth the compensation assessed for the taking of land by a railroad ultimately assumes the form of a judgment at law which must be satisfied in money, and it is provided that a "warrant of distress or execution may issue to compel the payment thereof with costs and interest, and all its right and authority to enter upon and use the land or property, except for making surveys, shall be suspended until such warrant or execution is satisfied." Pub. St. c. 112, § 101. At common law a common carrier of passengers could demand prepayment of the fare

before he could be compelled to receive and transport passengers. The fare demanded must be reasonable, and when it is established by statute this is a legislative determination of what is reasonable. A carrier can have no lien on the passenger to secure the payment of the fare, and must of necessity collect the fare in advance, or trust to the credit of the passenger, or of some other person. See *Railroad Co. v. Gage*, 12 Gray, 393; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Spofford v. Railroad Co.*, 128 Mass. 326.

Although, by reason of the public nature of the employment, the legislature can establish the rates of fare to be demanded by common carriers of passengers, we do not see that they can be compelled ultimately to take in payment anything which any other person could not be compelled to take in payment of a service rendered or in discharge of a debt. If a debt had been once incurred it could not be discharged except by a payment in money, or by the satisfaction of an execution by a levy upon tangible property. Although there may be little or no practical difficulty between solvent railroads if they choose to obey the statute, yet in theory each ticket or part of a ticket surrendered by a passenger for transportation represents a separate cause of action against the railroad issuing it. There is no fund provided for the redemption of the ticket, and no tangible property on which there is a lien. The statute puts no limit upon the number of mileage tickets which any railroad may issue, or upon the time within which they must be used. It does not prohibit a railroad from selling them for less than \$20 each, although it must redeem them at that price. It is possible that a railroad in need of money might resort to enormous sales of such tickets as a mode of raising money, and that these tickets might remain outstanding, to be used on other roads indefinitely, and that many of them might be presented for redemption at some remote time in the future, when the railroad company issuing them might be unable to redeem them. If it be assumed that under the power to regulate the fares of common carriers of passengers the legislature can require the passengers to be carried before the fares have been actually paid in money, the security for the ultimate payment of the fares in money ought, we think, to be as certain as that required when private property is taken for public uses, and we are of opinion that this statute does not provide adequate security.

The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads also seems to us valid. The objection is not that the legislature has itself attempted to declare the rights of passengers who have pur-

chased mileage tickets. The legislature, by this statute, has not determined the conditions which shall be incident to the carriage of passengers under these tickets; nor has it left them to be determined by the railroad company transporting the passengers. One railroad is, in effect, authorized to make a contract for another; but the railroads are not, in fact, the agents of each other in issuing these tickets. It has been often said that the legislature cannot make a contract between two or more persons which they do not choose to make, although it may sometimes impose duties which can be enforced as if they arose from contract. Without denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, we are of opinion that this power cannot be delegated to private persons or corporations.

It is not necessary or practicable to attempt in these cases to determine just how far the legislature may go by way of regulating the business of railroad companies within the commonwealth, nor just where the limits of its power end, nor whether certain provisions of the statute, if taken alone, would be valid. The statute must be considered as a whole. The statute requires a railroad company to transport passengers, and to receive therefor tickets or coupons which merely give separate causes of action against another railroad company, and no security is provided that these tickets or coupons will be redeemed in money by the railroad company issuing them when presented for redemption, and they may be used for transportation long after they are issued. The company issuing tickets may impose upon other railroads duties and responsibilities in the carriage of passengers different from those it assumes toward passengers who purchase tickets of itself, and the tickets may be used indiscriminately upon all railroads within the commonwealth not excluded or exempted from the provisions of the statute, and are not confined to railroad companies engaged in transporting passengers in connection with the company issuing the tickets. The railroad commissioners may exercise their power of excluding a railroad company from the provisions of the statute in season to prevent loss from a failure of the company to redeem the tickets issued, or they may not. The rights of railroad companies ultimately to receive in money the fares of passengers ought not to depend upon the discretion of the railroad commissioners, and, if the statute would be invalid but for this discretion, this provision would not make it valid.

LATHROP and BARKER, JJ., agree that the informations are rightfully brought by the attorney-general, and that the court has jurisdiction, and are of opinion that the necessary effect of the statute is to apply and appropriate individual property to the public use, without the owner's consent, and without legal provision for a reasonable compensation therefor; and for this reason they agree that the statute is void, without expressing an opinion upon the other matters discussed in this opinion. A majority of the court are of opinion that the petitions should be dismissed.

KNOWLTON, J. (*dissenting*).—I concur in everything contained in the opinion of the chief justice, except the discussion of the two points on which the decision is made to turn, but I do not agree with him in that, and I do not think the statute unconstitutional. In the opinion the question whether the statute is void as impairing the obligation of contracts contained in the several charters under which the railroads were organized was somewhat considered, but not decided. In the view which I take of other parts of the case, it becomes necessary to consider this question further. I need not go over the ground traversed by the chief justice. It is obvious that the object of the Statutes of 1831, c. 81 (Rev. St. c. 44, § 23), was to prevent charters afterward granted by the legislature from being held to be contracts; and all subsequent charters must be deemed to have been granted subject to that general law, except in cases where the legislature saw fit plainly to abrogate it. If a charter was afterward granted which expressly professes to bind the commonwealth by a contract, doubtless the commonwealth is bound; but in interpreting subsequent charters this general law must be given effect so far as it can be without coming in direct conflict with express contracts, plainly intended as such by the legislature.

If we assume that in some of the charters of railroad corporations now included in the Old Colony Railroad Company there was an express contract that the legislature should not reduce the fares and charges so as to leave an income of less than 10 per cent on the cost of the railroad, and that the general law above cited does not apply to these contracts so far as they have been executed on either side, it must still be held that the legislature could at any time amend or repeal these provisions of the charters so as to prevent future action on the faith of them, leaving them in effect only so far as rights had accrued by the execution of them. It would be very unreasonable to hold that by such a provision the legislature was bound for all time to allow rates and charges which would produce an income of 10 per cent not only on

the cost of the railroad as first built and completed under the charter, but also on every extension, enlargement, or improvement of it after it had been completed according to the original plan. By the Statutes of 1870 (chapter 325, § 1), reenacted in the Statutes of 1874 (chapter 372, §§ 4, 174), which last sections are still in force, the legislature terminated the right of these railroad corporations to go on expending money and increasing the cost of their railroads under a contract which permitted them, without the possibility of legislative interference, to charge fares which would give them an income of 10 per cent on the cost of the road, if such a right had previously existed. As I understand the report, the Old Colony Railroad Company did not contend at the hearing that the statute under consideration would reduce its income below 10 per cent on the cost of the road at the time its right to build a road or to increase the cost of it under the provisions of the original charters was terminated by the Statutes of 1870. Moreover, I am of opinion that the Old Colony Railroad Company, by accepting the benefit of legislation, subject to general laws which gave the legislature the right to revise its fares, rates, and charges, has lost the right, if it ever had it, to interpose the provisions of the original charters against a statute which assumes in a reasonable way to regulate or reduce its fares. In the suit against the Boston & Albany Railroad Company nothing appears in the record which opens this defence, or requires considerations of the numerous statutes under which the corporation is acting. I am therefore of opinion that the petitions should not be dismissed on the ground that the statute impairs the obligation of contracts securing to the respondent immunity from reduction of fares.

The only grounds on which the statute is held unconstitutional by the majority of the court are: First, that it seeks to compel the transportation of passengers by one railroad on the credit of another, to which the money for payment of the fare has been advanced by the purchaser of a mileage ticket; and, secondly, that a mileage ticket is to be "accepted and received for fare and passage" upon other railroads "under like conditions as upon the line or lines of the corporation issuing such ticket." The property of railroad corporations is devoted to a public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the state. If the state grants fran-

chises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way. It may do this in the exercise of the police power, which is a power inherent in every well-ordered system of government.

It is the power which is granted in terms to our legislature by article 4, c. 1, of the constitution of Massachusetts, which gives the general court full power and authority "from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and order thereof and the subjects of the same, and for the necessary support and defence of the government thereof," etc. Moreover, most of the charters of railroad corporations have been granted and accepted subject to a reserved right in the legislature to alter or repeal them. It is settled that this right to regulate the business of railroad corporations extends so far as to authorize the legislature to fix the rates and charges for the transportation of passengers and freight. The principle is established by decisions, not only of this court, and of the Supreme Court of the United States, but of courts in most of the other states. *Parker v. Railroad Co.*, 109 Mass. 506; *Chicago, etc., Ry. Co. v. Iowa*, 94 U. S. 155; *Peik v. Railway Co.*, *Id.* 164; *Munn v. Illinois*, *Id.* 113; *Ruggles v. People of Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49; *Railway Co. v. Wellman*, 143 U. S. 339, 49 Am. & Eng. R. Cas. 1; *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *People v. Budd*, 117 N. Y. 1; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399-414; *Lake Shore & M. S. Ry. Co. v. Cincinnati, S. & C. Ry. Co.*, 30 Ohio St. 604; *Hockett v. State*, 105 Ind. 250-258, 11 Am. & Eng. Corp. Cas. 577; *Telephone Co. v. Bradbury*, 106 Ind. 1; *Central Union Tel. Co. v. State*, 118 Ind. 194-207, 25 Am. & Eng. Corp. Cas. 481; *Baker v. State*, 54 Wis. 368-373; *Nash v. Page*, 80 Ky. 539-545; *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 140; *Stone v. Railroad Co.*, 62 Miss. 607-639.

A minority of the justices of the Supreme Court of the United States dissent from decisions of the majority extending the doctrine to the regulation of charges for the use of grain elevators (*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517-540, 36 Am. & Eng. Corp. Cas. 31), making a distinction between what they consider a public use of property and a public interest in the use of property. But

they agree with the majority that railroad corporations are subject to regulation. Mr. Justice FIELD, one of this minority, in giving the opinion of the court in *Banking Co. v. Smith*, 128 U. S. 174-179, 35 Am. & Eng. R. Cas. 511, says: "The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or, as Chief Justice MARSHALL expresses it, 'by which the character and properties of individuality' are bestowed 'on a collective and changing body of men' (*Bank v. Billings*, 4 Pet. 514-562), the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the state's right of eminent domain, that it may appropriate needed property,—a right which can be exercised only for public purposes,—and the obligation assumed by the acceptance of its charter to transport all persons and merchandise upon like conditions and upon reasonable rates, affected the property and employment with a public use; and where property is thus affected, the business in which it is used to subject to legislative control. So long as the use is continuous, the power to regulate remains, and the regulation may extend not merely to provisions for the security of passengers and freight and against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discrimination. This is not a new doctrine, but old doctrine, always asserted whenever property or business is by reason of special privileges received from the government the better to secure the purposes to which the property is dedicated or devoted, affected with a public use." In *Budd v. New York*, 143 U. S. 517-549, 36 Am. & Eng. Corp. Cas. 31, Justice BREWER, another of this minority, says: "The use is public, because the public may create it, and the individual creating it is doing thereby, *pro tanto*, the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is, *pro tanto*, doing the work of the state. He devotes his property to a public use. It does not lose the right to fix the price because an individual voluntarily undertakes to do the work." This is equivalent to saying—what is undoubtedly the law—that it does not lose the right to make any reasonable regulation for the benefit of the public in regard to the transaction of any or of all the railroad business in the state.

The legislature's determination of what is reasonable is also conclusive, subject only to the limitations that its enactment shall not conflict with any expressed or implied provisions of the constitution, either of the state or of the United

States. I am not aware of anything in either constitution which forbids the state in regulating the public business of transporting passengers within its borders, when the business is carried on by its own creatures, whose financial ability it is supposed to know, from requiring these corporations to issue tickets which, when paid for, shall be received for transportation on a line of railroad other than that issuing it, and which shall entitle the carrying railroad to receive its pay from the railroad which issued and sold the ticket. It seems to me plain that this is not within the express provision of our state constitution, which forbids the taking of private property without compensation, or for other than a public use. I think it is not a taking of property without due process of law, within the meaning of that language in the constitution of the United States, nor an interference with the right of "of acquiring, possessing, and protecting property" which is secured by the declaration of rights in the constitution of Massachusetts. It is merely a regulation of public business which the legislature has a right to regulate. Its apparent object is to promote the convenience of persons having occasion to travel on different railroads, and to reduce for them the cost of transportation.

The risk of pecuniary loss to a corporation from carrying a passenger on the credit of another corporation to which the money has been advanced for carriage, instead of having payment at the time, is almost infinitesimal. In the first place, all railroad corporations are required to make annual reports to the commonwealth (Pub. St. c. 112, § 81), and the legislature is presumed to know that all, or nearly all, of them are of ample financial ability, and that their obligation to pay a small debt is as good as that of any city or town in the state; secondly, if there are any now, or if hereafter there should be any which are not financially sound, it would be the duty of the railroad commissioners, on application, to relieve all other corporations from the obligation to take their tickets. In the natural course of business there would be frequent settlements of accounts between the different railroads, as there are now, and the most that any railroad could owe another under this statute would be the difference between the cost of the other's mileage tickets held by itself and the cost of its own tickets held by the other, which would ordinarily be but a trifling sum. It would be impossible for any railroad to harm its neighbors by issuing and selling a large number of mileage tickets in the anticipation of becoming insolvent; for, if it were possible to sell them, the railroad commissioners, at any time, on application, would exclude it from the provision of the act, and other railroads could not afterward be required to ac-

cept its mileage tickets; and the loss, if any, would fall on the purchasers of the tickets, whose contracts would be with it alone. The risk of loss from inability of one railroad to collect of another under mileage tickets taken from passengers seems to me too small to be seriously considered, and I regard the objections to the statute in this particular as theoretical and speculative, rather than substantial or practical. It is a matter of common knowledge that every railroad does business on the credit of other railroads to a much larger amount than would ever be done under a statute of this kind.

But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional. The question is rather whether there is a probability of losses so large as to make such a requirement plainly unjust and unreasonable as an interference with "the right of acquiring, possessing, and protecting property." I think nobody can contend that there is such a probability. Moreover, the very idea of the exercise of the police power necessarily implies a greater or less interference with the acquisition, use, and enjoyment of property. *Sawyer v. Davis*, 136 Mass. 239; *Miller v. Horton*, 152 Mass. 540. Every statute affecting property, enacted in the exercise of this power, illustrates the proposition. The reduction by the legislature of fares upon railroads is an illustration which, in my opinion, touches much more closely the acquisition, possession, and protection of property than does a requirement that railroads shall trust each other during short intervals for the payment of fares for which interchangeable tickets have been taken.

In determining whether the statute is so unreasonable as to be against common right, real conditions and probable results, and not remote possibilities, are to be considered. It will hardly be contended that every statute enacted for the regulation of the railroad business of the commonwealth which contemplates the giving of a short credit by one railroad company to another in the convenient transaction of their business is, for that reason, unconstitutional. There are many general and special laws which require railroads to render services, to furnish station accommodations, and permit the use of tracks and the like to another corporation for a reasonable compensation, to be agreed upon, or, in the absence of agreement, to be fixed by the railroad commissioners. In many cases it would be difficult, if not impracticable, to provide for these payments in advance, and some, at least, of the statutes seem to contemplate that payments will be made upon short credits, as the practice is, after the services are rendered or the benefits received. Pub. St. c. 112, §§ 216-

218; St. 1866, c. 126; St. 1872, c. 180; St. 1871, c. 343. Some of these statutes require the payment of rent for the use of a station built and owned by one railroad and used by others. The rent must either be paid in advance, or there must be some credit for it; it could hardly be paid daily. A requirement that the rent should be paid in advance would be quite as objectionable on constitutional grounds as a provision for a reasonable credit. The building might be destroyed, and the company that had paid rent in advance might get no equivalent for its payment. It seems to me that a regulation which may require a short credit for trifling sums, arising in the regular course of business between great corporations, most of which have property amounting to many millions of dollars in value, is not for that reason unconstitutional.

Similar considerations apply to the objection that the tickets are to be received by the different railroads in the state under like conditions. It may be that in favor of the constitutionality of the law this language might be construed to mean something less than that the provisions of a contract in regard to the amount of baggage which may be carried, and the like, made by the railroad issuing the ticket, are to be applicable when the ticket is used on the railroad of another company: but if we assume in favor of the respondents that this is the meaning of the language, the difficulty does not seem to me to be great. In the first place, it is a familiar fact that upon railroads generally there is no such difference in their contracts as to create any practical difficulty in issuing tickets to be used over many different lines of connecting railroads. Everybody knows that one may buy, at any important railroad station in the state, a ticket to go thousands of miles over numerous railroads, whose owners will all receive the ticket under like terms and conditions. The reasonableness and constitutionality of the statute are to be determined in view of the existing facts in the management of railroad business, and not in view of the legal possibility that some corporation would insert in its mileage ticket an unusual or absurd provision. If such an unexpected event should occur, that would be a reason for the intervention of the railroad commissioners under the statute, to relieve other corporations by excluding or exempting the railroad from the provisions of the act, and it would be in the power of the legislature at the earliest opportunity to compel it to issue mileage tickets with reasonable provisions in regard to the transportation of baggage and other similar matters. No material harm could come to any person or corporation in the mean time.

In view of the way in which railroad corporations do their business, which must be presumed to have been known to the

legislature, and which must be considered in passing upon the statute, this objection, like the other, seems to me speculative and theoretical rather than real. The statute in these two particulars, which are now made the ground of objection to it, conforms to the well-known voluntary practice of railroad corporations in the transaction of similar business. These objections would seem to be removable by a provision that each corporation shall deposit with the state treasurer, or with some other responsible officer, a sufficient fund to guarantee the redemption of all mileage tickets issued by it, and by a requirement that all mileage tickets shall be in a form prescribed by the legislature; but, if the statute contained such provisions, is it probable that the people of the commonwealth or the railroad corporations would think it more reasonable, or better for practical operation, or more conducive to the best interests of the community?

I am of the opinion that the statute is a regulation of the business of the railroad corporations of the commonwealth, which does not involve such probable loss from carrying passengers on credit, or such practical difficulty from the terms and conditions on which tickets would be issued, as to be an interference with the rights of those who undertook to do this public business; and I therefore think the statute constitutional.

I am authorized to say that Mr. Justice HOLMES concurs in this opinion.

MARTIN

v.

NEW YORK & NEW ENGLAND R. Co.

(62 Connecticut, 381.)

Fire—Default by Railroad—Admission.—Where a railroad is sued under Conn. Gen. St., § 3581, making railroad companies liable for injuries caused by fire communicated from their engines, and the company suffers default, and is heard on the question of damages, the default admits that the fire was communicated to plaintiff's property by defendant's engine.

Fire Spreading—Proximate Cause.—Where fire is communicated from a railroad engine to the company's depot, and burns continuously without any intervening cause, to plaintiff's property, the injury is directly traceable to the first fire, and the company is liable.

Fires—Statute Imposing Liability—Negligence—Contributory Negligence.—Under Conn. Act of 1881, ch. 92 (Gen. St. § 3581.), making railroads

liable for injury to property by fire communicated by locomotives, a recovery may be had without showing negligence, if the property-owner be free from contributory negligence.

Statute—Loss of Personal Property.—A statute making railroads liable “when any injury is done to a building or other property” by fire communicated from a locomotive, includes an injury to personal property as well as real estate. The statute is remediable, and should be construed with reference to the evil the legislature intended to suppress.

Value of Property Burned—Evidence—Tax-list.—In a suit by a married woman to recover the value of buildings burned, a prior tax valuation made by her husband and the tax-assessor, in which the buildings are valued at less than she sues for and testifies they are worth, is not admissible by the railroad to show a less value.

APPEAL from Windham superior court.

S. E. Baldwin and *M. A. Shumway*, for appellant.

S. P. Hyde and *C. E. Searls*, for appellee.

CARPENTER, J.—Action on the statute (section 3581, Gen. St. 1888), to recover the value of property destroyed by fire. The defendant suffered a default, and was heard on the question of damages. The court rendered judgment for the plaintiff for substantial damages, and the defendant appealed.

The first error assigned is as follows: “The court erred in not holding and ruling that upon a hearing in damages, after a default, the burden was upon the plaintiff to prove that the fire was communicated to the property by a locomotive, to entitle her to recover more than nominal damages.” The sole cause of action stated in the complaint is as follows: “(5) On said day, and without contributory negligence on the part of the plaintiff, a fire was communicated to said property by a locomotive engine owned and operated by the defendant, whereby said property was consumed and destroyed.” The statute on which the action is brought is as follows: “When any injury is done to a building or other property of any person, by a fire communicated by a locomotive engine of any railroad company, without contributory negligence on the part of the person entitled to the care and possession of the property injured, the said railroad company shall be held responsible in damages to the extent of such injury to the person injured; and every railroad company shall have an insurable interest in the property, for which it may be so held responsible in damages, along its route, and may procure insurance thereon in its own behalf.” The cause of action, as alleged, is admitted by the default. The cause of action is simply that the defendant’s locomotive communicated fire to the plaintiff’s property, and destroyed it. If that is not admitted, nothing is, and the plaintiff can-

not recover at all; but the defendant does not claim that. There is no error in this ruling.*

The second error assigned is that, "the court erred in holding and ruling from the facts found that the fire was communicated to the plaintiff's property by a locomotive, inasmuch as the finding shows that the fire was communicated to the plaintiff's property by the fire, heat, and sparks from the burning station on the land of the defendant." In substance, it is claimed that this statute is somewhat harsh and arbitrary, imposing a liability where the common-law imposes none,—a liability that cannot be avoided by any degree of care,—and therefore that it should be strictly construed, and not extended to cases not within its letter; that when it says that the railroad company shall be liable for property destroyed by fire communicated to it by its locomotive, it cannot be held to embrace property destroyed by fire communicated to it by the burning of other property, although such other property may have been set on fire by the locomotive.

There are two views that may be taken of this statute. The first is that suggested by the defendant's counsel, rather than distinctly claimed, that it is to be construed in connection with section 1096, which provides that in actions to recover for any injury occasioned by fire communicated by any locomotive, the fact that said fire was so communicated shall be *prima facie* evidence of negligence, etc., and therefore that negligence is the ground of recovery under this statute. On that basis the defence cites two cases: *Railroad Co. v. Kerr*, 62 Pa. St. 353; and *Ryan v. Railroad Co.*, 35 N. Y. 210,—both of which seem to hold that the negligence cannot pass over the burning of the station to the burning of the plaintiff's property; in other words, that the injury to the plaintiff is not the proximate effect of the negligence, but is too remote. Both these cases are criticised by text-writers as being too narrow, and not giving a correct view of the law as it exists elsewhere. Each, in its own jurisdiction, has been qualified and explained by later cases, so as to take from its weight as an authority. *Railway Co. v. Keighron*, 74 Pa. St. 316; *Railroad Co. v. Hope*, 80 Pa. St. 373; *Webb v. Railroad Co.*, 49

* The ruling of the court below was as follows: "The defendant claimed that to entitle the plaintiff to recover more than nominal damages upon the default, the burden was upon her to prove that the fire was communicated to her building by a locomotive of the defendant. The court did not so rule, but held that the plaintiff was *prima facie* entitled on the default to recover damages to the full extent proved to have been sustained by her from the fire, and that the defendant, to reduce the damages to nominal, might show that the fire was not communicated by its locomotive."

N. Y. 420; Pollett v. Long, 56 N. Y. 200. In Pennsylvania Co. v. Whitlock, 99 Ind. 16, 22 Am. & Eng. R. Cas. 629, and in Billman v. Railroad Co., 76 Ind. 166, 6 Am. & Eng. R. Cas. 41, the Ryan and Kerr cases are disapproved. The authority of those cases is so much shaken that we are not inclined to follow them, but to adhere to the rule adopted in this state in Simmonds v. Railroad Co., 52 Conn. 264, 23 Am. & Eng. R. Cas. 369, that when the fire is continuous, reaching the property of the different owners, without the aid of any other intervening cause, the injury to each person is equally the result of the negligence which started the fire. In other words, where the injury to each successive property is directly traceable to the first fire, it results from the negligence, and cannot be regarded as too remote. Applying that rule to this case, we cannot doubt that this point was correctly decided in the court below. The heat, flames, and sparks from the burning station were directly applied to the plaintiff's property, and caused its destruction. There is no room for any other intervening agency. In many of the cases referred to, also in the case of Railroad Co. v. Kellogg, 94 U. S. 469, the question whether the injury is proximate or remote is regarded mainly as a question of fact. In that view of the case, also, we should be unable to disturb the judgment; for it will be presumed that the court below found as a fact that the injury was direct, and we cannot review that finding.

The other view of the statute is that it eliminates the matter of negligence entirely, and makes the railroad company liable on other grounds. Experience demonstrated that,

Negligence
need not be
proved.

in all cases of fire set by the operation of railroads, it was extremely difficult, and in some cases impossible, to prove negligence, even where it existed.

That fact led the legislature, in 1875, to enact what is now section 1096, making the fact of the fire so communicated *prima facie* evidence of negligence. Even then the difficulty was but partially removed; for in most cases the defendant could easily prove due care, and the plaintiff would be illy prepared to meet it. So, in 1881, the legislature took the broad equitable ground that, upon proof of the fact that the locomotive communicated fire to and destroyed property, the company should be liable, irrespective of the question of negligence. The reasons underlying this legislation are not hard to find. The railroad companies were in possession of great powers and privileges granted by the state. The use of such powers was necessarily attended with dangers to property along the line of the road, and fires were of frequent occurrence. The legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad

companies might well be required to make them good. Nor is such a requirement unjust. On the contrary, it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises, they necessarily expose private property. They have a license from the public to carry on extensively a dangerous business, from which they receive large profits. Why should not they be required to assume the risk, rather than individuals?

But in reality the risk is not wholly nor largely on them. They have the means of protecting themselves by insurance. That is a privilege expressly conferred by statute. But, more than that, they have the means of indemnifying themselves, to some extent at least, by increased rates for passengers and freight. Presumptively, they adjust their tariff of charges in view of this liability. If they do so, the loss falls ultimately upon the public. We are told that railroads are of incalculable benefit to the public. True. And the public is willing to tax itself in this indirect method for the purpose of paying these losses. Why should the railroad companies complain?

In this view of the case, the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a remedial statute, in the best sense, and we must so construe it as to suppress the mischief and advance the remedy. Now, what did the legislature intend? Clearly, it was that when railroad companies destroyed "buildings or other property" they should pay for it. The question that presents itself for solution is, Did the company cause the destruction of the plaintiff's property? There can be but one answer to that question. We are not required to be astute to throw the loss upon the plaintiff upon a technicality.

The third reason of appeal is that the court erred in admitting evidence to prove the loss of personal property, etc. The claim is that, under the rule of *ejusdem generis*, the phrase in the statute, "or other property," can only embrace property of the same kind as buildings; that is, real estate. We do not think that rule applies, unless we can gather from the language used, in connection with the subject-matter, that such was the intention of the legislature. The language is certainly broad enough to include personal property, and if it is to be gathered from the reason of the act, and the object the legislature had in view, that such was the intention, we must give effect to it. We entertain no doubt that the legislature intended to include personal property. The object was to compel railroads to make

good the loss to others sustained by fire occasioned by locomotive engines. Personal property is as much within the reason of the act as buildings. The loss is the same, whether it is one or the other; and, being within the letter, we do not feel at liberty to exclude it by the application of a somewhat artificial rule of construction. It is believed that the rule of *ejusdem generis* is only applied to statutes when it is necessary to give effect to the presumed intention of the legislature. There is no call for its application now.

There are other considerations which lead us to the same conclusion. If the effect of the statute is to conclusively impute negligence to the railroad company, then, certainly, it is liable for personal property. If the statute assumes that the act of the company in causing the destruction of property is in some sense wrongful, so that it is to be treated as a tortfeasor, or if the liability rests upon equitable principles, it would seem to be equally clear that it extends to personal property. In the case of *Regan v. Railroad Co.*, 60 Conn. 124, 49 Am. & Eng. R. Cas. 590, a recovery was had under the statute for the loss of personal property. True, the question now before us was not then made. The counsel argued and the court assumed that the defendant was liable. The reasoning of the court that the defendant was primarily and justly liable for the loss is inconsistent with the distinction now contended for. The suggestion as to the difficulty of insuring personal property is entitled to little or no weight. The object of that provision was to give railroad companies the means of securing partial indemnity, and not to define the kinds of property for which they were made liable. Had it been intended to limit the operation of the statute to real estate, the appropriate language to express that intention, and to remove all doubt, would have been, "buildings and other real estate." As other language is used, we think we ought to give that language its ordinary meaning.

The plaintiff's intestate died in the latter part of March. A store of goods came into her hands as administratrix. Having obtained authority from the court of probate, she arranged with one Elliott to carry on the business, and replace goods sold with new goods of like character, so as to keep the stock good until the appraisal should be completed, and the same could be disposed of. It was intended by both parties that after the appraisal was completed said Elliott would purchase the goods and business, but no agreement of purchase had been made. He conducted the business under that arrangement until the fire. Goods were sold from the store, the money was deposited in the bank in his name, with the money he

Plaintiff's
title to prop-
erty.

purchased other goods to replace those sold, said goods being bailed to him, and in this manner the stock was kept substantially as it was at the death of Mr. Martin. There had been no settlement between Elliott and the plaintiff.

"The defendant claimed and asked the court to rule that the goods purchased as aforesaid by Elliott were his goods, and not the plaintiff's, and that she was not entitled to recover therefor. The court did not so rule." This ruling is assigned as the fourth reason of appeal. No question of law is here presented. This seems to be an ingenious attempt, by the use of the word "rule," to turn a question of fact upon evidence into a question of law. There may be an implied claim that it is legally impossible for the plaintiff, under the circumstances, to be the owner of the goods purchased by Elliott. That claim requires no answer.

The questions hitherto considered are common to both cases. The case of *Martin v. Railroad Co.* is an action to recover the value of certain buildings belonging to Mrs. Martin, which were destroyed by the same fire. The plaintiff testified that the value of the buildings destroyed was \$3500. The defendant offered in evidence a copy of the tax-list for the year 1890, signed by the plaintiff's husband, Charles F. Martin, agent, and sworn to by him, in which said real estate was entered at a valuation of \$800, for the purpose of proving that the value of said property was less than \$3500, and to contradict the plaintiff's testimony. This evidence was objected to and excluded by the court. This ruling is assigned as the fourth reason of appeal. That the valuation put upon property by the assessors for the purposes of taxation is not admissible in a suit between other parties, for the purpose of proving the actual value of the same property, has been repeatedly decided in Massachusetts. *Brown v. Railroad Co.*, 5 Gray, 40; *Flint v. Flint*, 6 Allen, 39; *Kenerson v. Henry*, 101 Mass. 152. The defendant was neither party nor privy to the tax-list. The evidence offered could, under no circumstances, have been used against the railroad company. How, then, could it be admissible in its favor? The valuation of property by assessors is solely for the purpose of determining the amount it shall pay as taxes. The evidence offered did not tend to contradict the plaintiff. The husband was not her agent to put a valuation upon the property. He was required to make oath to the list, but not to the valuation.

There is no error.

Statutes Imposing Absolute Liability for Fires.—See *Union Pac. R. Co. v. DeBusk* (Colo.), 38 Am. & Eng. R. Cas. 821, note, 833.

Liability where Fire Spreads—Intervening Cause.—A railway company is liable for injury to property caused by the negligent setting out of fire in pine woods, where the ground is covered with straw, grass, and other combustible material, if the fire burned continuously from the point where it was set out to the property in question, and the spread of it was not occasioned by any intervening cause, although such property may have been situated two miles or more from the place where the fire originated. A high wind, unless shown to be extraordinary, by which the fire was facilitated in passing from one side to the other of roads traversing the district, would not be considered as an intervening cause. *East Tenn., V. & G. R. Co. v. Hesters* (Ga., Oct. 1, 1892.), 15 S. E. Rep. 828. See also *Jacksonville, T. & K. W. R. Co. v. Peninsular, Land, T. & M. Co.* (Fla.), 49 Am. & Eng. R. Cas. 603, note, 668.

Measure of Damages for Destruction of Trees by Fire.—In an action for damages for the destruction of an orchard of fruit-trees by fire, the measure of damages is not the cost of replacing the trees, and the value of the care and labor bestowed on the destroyed trees before the burning, but the value of destroyed trees at date of fire. *Stoner v. Texas & Pac. R. Co.* (La., Jan. 2, 1898.), 11 So. Rep. 875.

NORTHERN PACIFIC R. CO.

v.

LEWIS.

(7 U. S. App., 9th Circuit, 254.)

Fires—Right of Trespasser to Recover for Property Burned.—One who goes upon the public lands of the United States and cuts wood therefrom without permission, and for his own benefit, may recover its value from a railroad that negligently permits fire to escape from its locomotive to dry grass along its track, and thence to the wood.

Evidence as to Other Fires at Other Times.—Where plaintiff sues to recover for property destroyed by fires started by sparks from defendant's locomotive, without designating any particular locomotive, evidence that the fire originated from one of two locomotives, and that these and other locomotives had set other fires, both before and after the injury complained of, is admissible, as tending to prove possibility, and consequent probability, that some locomotive caused the fire, and that there was negligence in the management of trains.

Evidence of Dry Grass on Right of Way—Contributory Negligence.—When the statute of the state requires railroads to keep their right of way clear of dead grass and other combustibles, and failing to do so, sparks from a locomotive set fire to such grass, and it spreads to plaintiff's property, it is competent to prove that the right of way at other points in the neighborhood was not so cleaned. Such evidence is also competent as tending to show contributory negligence where it appears that the same engine started a second fire a half mile away, and plaintiff's servant ceased fighting the former and went to the second, which allowed the fire doing the injury to spread.

Contributory Negligence.—Plaintiff piled his wood near a railroad, and

cleared the brush and other combustible material away between his wood and the track. Sparks from a locomotive set fire to dead grass along the track, and burned beyond plaintiff's wood, and then back to it through underbrush. *Held*, that plaintiff was not guilty of contributory negligence in not clearing the grounds back of the wood.

Change of Wind—"Intervening Cause."—A change in the direction of the wind after such fire had been set, without a change in its intensity, is not such an intervening cause as to effect the liability of the railroad.

IN error to the Circuit Court of the United States for the District of Montana.

W. E. Cullen and Geo. T. Shelton, for plaintiff in error.

Wm. Wallace, Jr., and Thos. C. Bach, for defendants in error.

Before McKENNA and GILBERT, circuit judges, and DEADY, district judge.

GILBERT, Circuit Judge.—This case comes on a writ of error to the Circuit Court of the United States for the district of Montana. The case was tried before a jury, and a judgment rendered against the railroad company for the sum of \$21,487.83. The complaint alleged in substance that on or about April 5, 1890, while the railroad company was using and operating a railroad in Jefferson county, Mont., it failed to keep its right of way and railroad-track free from dead grass, weeds, brush and other combustible material, and used locomotives which threw a large amount of sparks, which fell upon the track and right of way, thereby setting fire to said dead grass, etc., which fire spread and destroyed 9400 cords of wood belonging to said George S. Lewis, *et al.* The railroad company answered, denying the allegations of negligence, and denied that it caused the fire or destroyed any wood belonging to the defendants in error. It further denied that said George S. Lewis *et al.* were the owners of the cordwood mentioned in the complaint, or that they had suffered any damage by any acts of the railroad company; and affirmatively alleged that the loss, if any, occurred through the negligence or carelessness of said defendants in error. There are many assignments of error, some of which are repetitions of substantially the same assignment. The more important of these, and those relied upon upon the argument, will be considered in the order in which they were presented.

It is claimed that the court erred in refusing to instruct the jury that the title or ownership of the wood destroyed was directly in issue, and that, in order to maintain the action, the plaintiffs must show that they were the owners of the wood, or that they had a special property therein. It appeared that the wood was cut upon the public lands of the United States, without authority or

Case stated.

Trespasser
may recover.

permission from the government. At the time it was destroyed it was piled upon the public lands near the company's railroad track. The defendants in error were hauling wood to the pile, and shipping wood to market by the company's road, at and prior to the time of the fire. The pile was in charge of a foreman, whose duty it was to rake and clear the ground around it for protection against fire. The court below instructed the jury that, as against defendant, the plaintiffs were the owners of said wood, although the same was cut from lands belonging to the United States. After a careful consideration of the numerous authorities cited, we are of the opinion that there was no error in giving this instruction, or in refusing to charge as requested by the plaintiff in error. This case comes within the general rule governing the action of trespass for injury to personal property. In such a case possession is *prima facie* evidence of right, and no stranger may disturb that possession without showing some authority or right from the true owner. The rule applies to the negligent destruction of property, as well as to its wrongful taking and asportation. The fact that the land on which the wood was cut was government land, and the wood, when cut and sawed, still belonged to the United States, and the fact that the defendants in error may have been trespassers, can make no difference with the application of the rule. In such a case the defendant is not allowed to justify his own wrong by showing the plaintiff's wrong, and he is not allowed to question the title of plaintiff in possession, unless he connects himself with the true title.

Some cases are cited by plaintiff in error to sustain its contention that recovery cannot be had in favor of a trespasser upon the public lands. It will be observed that the decisions in those cases are expressly based upon the fact that the parties who brought the actions had not the actual possession, and being trespassers under no claim of right, could not have the constructive possession of the property taken or destroyed. The case of *Turley v. Tucker*, 6 Mo. 583, was a case where logs had been cut and left upon the government land by the plaintiff. Subsequently the defendant appropriated the logs to his own use. The plaintiff's right to recover was denied, not because he had wrongfully cut the logs upon the public lands, but for the reason that he had no actual possession of the logs, and claimed no right to the land upon which they were cut. In the case of *Murphy v. Railroad Co.*, 55 Iowa, 473, the plaintiff had cut hay and stacked it upon the uninclosed prairie. The hay was destroyed by fire through the defendant's negligence. Plaintiff was not in actual possession of the hay, and made no claim to any right in the land. It was held he

could not recover. In the case of *Railway Co. v. Hecht*, 38 Ark. 357, it was said by the court that, in an action for the destruction of property, "an allegation of ownership is material;" but that statement, if it amounts to a denial of the doctrine that possession is *prima facie* evidence of ownership, must be regarded as *obiter*, for the pleadings in the case expressly admitted the plaintiff's ownership. The case before the court is distinguishable from these from the fact that the defendants in error were in the actual possession of the wood. The destruction was total. The amount to be recovered was not the value of the possession, or anything less than the full value of the property destroyed. *Kennedy v. Whitwell*, 4 Pick. 466; *Ingersoll v. Van Bokkelen*, 7 Cow. 670-681; *White v. Webb*, 15 Conn. 305.

It is assigned as error that the court permitted evidence of other fires set at other points on the road and at other times, and by other engines, and instructed the jury to take into consideration the fires so set in determining the question of negligence. The complaint did not designate the particular engines which were claimed to have caused the fire. The testimony, however, tended to show that the fire originated from one of two certain locomotives, and that these and other locomotives had set other fires both before and after the injury complained of. This evidence was clearly admissible, under the authority of the decision in the case of *Railroad Co. v. Richardson*, 91 U. S. 454, as "tending to prove the possibility, and consequent probability, that some locomotives caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."

Other fires.

It is claimed that the court erred in permitting the defendants in error to prove that the right of way and the track at other points than that where the fire occurred were incumbered by dead grass and other combustible

material. Comp. St. Mont. p. 830, reads as follows: Evidence as to dry grass on right of way.

"Sec. 719. It shall be the duty of all railroad corporations or railroad companies operating any railroad within this territory to keep their railroad track, and either side thereof, for a distance on each side of the track or roadbed, so far as it passes through any portion of the territory of Montana, free from dead grass, weeds, or other dangerous or combustible material; and any railroad company or corporation so failing to keep their railroad track free and clear, as above specified, and each side thereof, shall be liable for any damages which may occur from fire emanating from operating the railroad; and a neglect to comply with the provisions of this chapter in keeping clear any railroad

track, and either side, for a distance equal to the space of ground covered by the grant of the right of way of the railroad company, provided that the same does not exceed one hundred feet on each side of the roadbed, shall be *prima facie* evidence of negligence on the part of any railroad corporation so operating any railroad within the territory of Montana."

Witnesses were allowed to testify as to the condition of the track "all along up through there, at points opposite the camp." We do not think the inquiry took too wide a range. The investigation was sufficiently confined to the immediate neighborhood of the fire, and it is not perceived that the plaintiff in error could have been injured by it. There is another view under which this evidence was clearly proper. The fire started at bridge 71, half a mile from the wood-pile. In the intervening space a second fire was started by the same train. The foreman who was fighting the first fire abandoned it for a time to extinguish the other. In the mean time the first fire increased and spread. It was proper to consider the condition of the track through the entire distance, as affecting the question of contributory negligence of defendants in error in their action in opposing the spread of the fires.

The instruction of the court upon the statute quoted above is assigned as error. The court said: "It was made hereby the duty of the defendant to keep the railroad track and right of way, to the distance of 100 feet on each side of such track, free from dead grass, weeds, and other dangerous and combustible material, and the failure to do so was *prima facie* evidence of negligence on the part of the railroad company."

It is claimed that this instruction leaves out of consideration the question whether the combustible material left in the right of way was the means of communicating the fire. This instruction, so far as it goes, is a synopsis of the statute, and consequently a correct exposition of the law. The record discloses that the only exception taken to it was on the ground that there was no evidence to show the width of the right of way to have been 100 feet on each side of the centre of the track, and that the width was a question of fact for the jury. If there were any error in the failure to charge further, as now claimed, it was waived by the plaintiff in error. *Mutual Life Co. v. Snyder*, 93 U. S. 396.

It is claimed that there was error in the instruction upon the subject of contributory negligence. The court charged the jury that it devolved upon the defendant to prove, by a preponderance of evidence, that the plaintiffs were guilty of contributory negligence. Plaintiff in error admits the correctness of this rule in ordinary cases, but contends that whenever the plaintiff, in making his

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case, shall have disclosed evidence of his own contributory negligence, the burden of proof is shifted, and it devolves upon him to show that his negligence was not of a character to bar his right of action. The evidence which it is claimed proved the plaintiff's contributory negligence consisted in the fact that, upon the further side of the wood pile, and extending toward the timber, the plaintiffs had failed to clear the brush and combustible material out of an open draw, through which draw the fire, after reaching the timber, was communicated to the wood. We cannot see in this omission any evidence of contributory negligence. The law did not impose upon the defendants in error the duty of clearing the ground around their wood-pile. As a matter of precaution, they had cleared away inflammable material at all points where they anticipated danger of the approach of fire, and there was nothing in their failure to clear the draw which would shift the burden of proof. *Coasting Co. v. Tolson*, 139 U. S. 557.

The instruction of the court upon the subject of intervening cause is assigned as error. The evidence was that at the beginning of the fire the wind was from the south, and served to blow the fire away from the road; subsequently it shifted to the north—a change which was usual at ^{Intervening} _{cause} that time of the year. There is no evidence of a change in the intensity of the wind. The court charged the jury as follows: "It is claimed the rise and change of the wind should be classed as an intervening cause, but I must state to you that I think it should not be so considered." It is contended that the jury should have been allowed to determine whether the change in the wind was an intervening cause. No authority has been cited which supports this contention. It is only the occurrence of a heavy and extraordinary wind that has in certain cases been held to be an intervening cause. A simple, and not unusual, change in the direction of the wind cannot be said to disturb the unbroken connection between the wrongful act and the injury, and hence is not an intervening cause. The jury were properly so instructed.

The judgment is affirmed.

Fires Caused by Railroads—Evidence of Escape of Sparks from Other Engines and Other Fires.—In *Inman v. Elberton Air-line R. Co.* (Ga., Jan. 4, 1893.), 16 S. E. Rep. 958, it was alleged that the burning of the plaintiff's property was caused by sparks which escaped from one of two engines described in the declaration, by reason of the defective condition of the engine, and the negligent manner in which it was operated. It was held that the refusal of the court to admit evidence that other engines of the defendant besides these two, and not shown to be of like construction, had at other times emitted sparks at or near the same place, is not ground for a new trial. The court said: "The question before the jury was

whether it was caused by one of these, and the negligence alleged was negligence in the condition and management of these two. How, then, could it be material or relevant to show negligence on other occasions, and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction? The cases cited in support of the contention that this testimony should have been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire, and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but when the engine is identified the same reason does not operate, and evidence as to the condition of other engines, and of their causing fires, is clearly irrelevant. To this effect, see 2 Shear. & R. Neg. (ed. 1888,) § 675, and cases cited. See, especially, the following cases: *Albert v. Railroad Co.*, 98 Pa. St. 316; *Railway Co. v. Decker*, 78 Pa. St. 293; *Coale v. Railroad Co.*, 60 Mo. 227; *Boyce v. Railroad Co.*, 42 N. H. 97; *Jacksonville, etc., Ry. Co. v. Peninsular, etc., Manufg Co. (Fla.)*, 49 Am. & Eng. R. Cas. 603; *Ireland v. Railroad Co.*, 79 Mich. 163; *Gibbons v. Railroad Co.*, 58 Wis. 335, 13 Am. & Eng. R. Cas. 469. In the last of these the question is considered at some length, and among the cases discussed is that of *Railroad Co. v. Richardson*, 91 U. S. 454, which was the authority mainly relied upon by counsel for the plaintiff in error here. It is said: "In that case, both in the brief of the learned counsel and in the opinion of Mr. JUSTICE STRONG, the language is very carelessly used that evidence that the locomotives of the company, at other times and places on the same road, were so constructed as to scatter fire along the track, might tend "to prove a possibility, and a consequent probability, that some locomotive of the company caused the fire, and show a negligent habit of the officers and agents of the railroad company." But in that case it is said, in the opinion: "The particular engines which caused the fire were not identified." In such a case such evidence might tend to prove the possibility, and consequent probability, that some locomotive of the company caused the fire. This wonderfully loose logic may be satisfactory to a judicial mind in cases where there was no proof that any particular and identified locomotive caused the fire in question, if any locomotive of the company did. But in due deference to the learned judge who wrote the opinion, and the other judges who have used this language, it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law. It would be a monstrous doctrine that when a party is sued in tort for a personal injury to another, occasioned by his negligence in not furnishing proper appliances or otherwise, his common carelessness, or carelessness in other cases, tends to prove the "possibility," and therefore "probability," that the act charged was the result of his negligence, without proof even that he committed it." In the case of *Railway Co. v. Hesters*, 15 S. E. Rep. 828 (decided by this court at the last term), in which the testimony as to the escape of sparks from engines of the defendant on occasions previous to the fire in question was held admissible, the evidence for the company showed that all the locomotives of the company were kept substantially in the same condition. Besides, in that case there was a general allegation that the fire was caused

by the defendant's engines, and no particular engines were described or identified."

In *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711, Judge SHIRAS, of the circuit court of appeals, takes the opposite view, and holds that in an action against a railroad company for the negligent burning of buildings situated near its tracks, where the only issue was as to the origin of the fire, evidence that, on different occasions within some weeks prior to the loss, fire had escaped from engines of the company in the immediate vicinity of the property, was admissible as tending to prove the possibility, and the consequent probability, that some engine caused the fire. *Railway Co. v. Richardson*, 91 U. S. 454, followed. The court said: "We do not think counsel for plaintiff in error have successfully distinguished the facts of the two cases. Counsel cite and comment at length on the cases of *Gibbons v. Railroad Co.*, 58 Wis. 335, 13 Am. & Eng. R. Cas. 469; *Railroad Co. v. Stranahan*, 79 Pa. St. 405; *Allard v. Railroad Co.*, 73 Wis. 165; *Ireland v. Railroad Co.*, 79 Mich. 163; and *Coale v. Railroad Co.*, 60 Mo. 227,—as authorities establishing the distinction that evidence showing the scattering of fire by the engines of the company at other times and places is only admissible when the identity of the particular engine supposed to have set the fire in the case on trial is unknown. We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the company that the fire was caused by sparks escaping from a particular engine, in which event the query would be as to the condition of that particular engine and the mode in which it was handled. On the contrary, the parties were at issue as to the origin of the fire, the plaintiffs claiming that it was due to fire escaping from some one of the engines of the company, and the defendant that it was due to fire escaping from the mill itself. Upon this issue it would certainly be open to the defendant to prove that the mill was so run and managed by the plaintiffs that the fire frequently escaped therefrom, and caused the burning of combustible matter in the vicinity of the mills, because such evidence would tend to support the claim of the defendant that the fire was started by sparks or live coals coming from the mill. In like manner it was, upon this issue of the origin of the fire, open to plaintiffs to prove that the engines of the company did permit the escape of sparks, causing other fires, as a fact tending to show that this particular fire thus originated. This action was brought under the provisions of section 60, c. 34, Gen. St. Minn., which enacts that: All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damage caused by fire being scattered or thrown from said cars or engines, without the owner or owners of the property so damaged being required to show defect in their engines, or negligence on the part of their employes; but the fact of such fire being scattered or thrown shall be construed by all courts having jurisdiction as *prima facie* evidence of such negligence or defect. * * * Under the provisions of this section, to obtain the benefit of the *prima facie* case therein provided for, it is necessary for the plaintiffs to prove that the conflagration complained of resulted from fire scattered or thrown from the cars of the railway company, and, when the company denies that the given fire so originated, then, upon this issue of the origin of the fire, it is competent to prove generally that the engines used by the defendant company do scatter or throw out fire, because, in the language of the supreme court in the *Richardson Case*, *supra*, such evidence tends to prove the 'possibility, and consequent probability, that some locomotive caused the fire.' See, also, *Sheldon v. Railway Co.*, 14 N. Y. 218; *Ross v. Railroad Co.*, 6 Allen, 87; *Longabaugh v. Railroad Co.*, 9 Nev. 271."

And in the case of *Gulf, C. & S. F. R. Co. v. Johnson* (C. C. A.), 54 Fed.

Rep. 474, it was held that in an action against a railway company for the loss of hay and grass by reason of the negligent escape of fire from its locomotives, evidence is admissible that both before and after the injury complained of defendant's engines had set fire to grass and other combustible matter in the immediate vicinity of plaintiff's premises, and similarly situated. See, also, *Jacksonville, I. & K. W. R. Co. v. Peninsular, L. I. & M. Co.* (Fla.), 49 Am. & Eng. R. Cas. 603; *Henderson v. Philadelphia & R. R. Co.* (Pa.), 48 Am. & Eng. R. Cas. 16, and cases cited in note, 30.

Contributory Negligence of Property-owners in not Guarding against Fire.—In *Cincinnati, L. St. L. & C. R. Co. v. Smock* (Ind., Jan. 24, 1893.), 33 N. E. Rep. 108, it was held that the plaintiff, in the construction and management of his ice-house, had the right to assume that the railroad company would manage its locomotive engine carefully, and would take such precautions as were necessary to prevent its exposure to unnecessary and unusual danger. It was the usual dangers against which the plaintiff was bound to provide, and not against the unusual. Citing *Railway Co. v. Burger*, 124 Ind. 275; *Railway Co. v. Jones*, 86 Ind. 496; *Kellogg v. Railway Co.*, 26 Wis. 233.

KURZ & HUTTENLOCHER ICE CO.

v.

MILWAUKEE & NORTHERN R. CO.

(84 Wisconsin, 171.)

Fires—Negligence—Condition of Locomotive—Question for the Jury.—Plaintiff's ice-house was near a side-track of defendant's road, which had been built to accommodate plaintiffs. In removing sawdust to the house plaintiffs left some, with other inflammable material, on and about the track. Defendant's engine passed over the track a few minutes before the fire was seen between the rails, which rapidly spread before a strong wind, and consumed the ice-house. The evidence showed that the engine was provided with the most approved appliances, and that fire could not fall on the track, if the dampers were closed and the ash-pan in proper condition. *Held*, that the question whether there was negligence in the construction, condition, and operation of the engine was for the jury, not for the court.

Combustible Material on and about Track—Duty of Company not Owning Ground.—The railroad did not own the ground where the side-track was laid, it being laid under a mere license. There was evidence that part of the inflammable material was placed on and about the side track by the railroad employes. *Held*, that the company was under the same obligation to keep the track clean as if it owned the ground, and that it should have been left to the jury whether such material was negligently left there, and whether the fire might have originated in it.

APPEAL from Milwaukee circuit court.

The action was brought to recover the value of plaintiff's ice-houses, ice, tools, etc., destroyed by fire May 17, 1890. In February, 1890, the plaintiff constructed the three ice-houses

which were burned, upon rented land on the shores of Lake Winnebago, near the City of Menasha. The houses were all joined together, and at about the same time the Jefferson Ice Company built two ice-houses west of and adjoining the plaintiff's houses. In March, 1890, the defendant railroad company constructed a temporary side-track along in front of the ice-houses, between them and the lake, and about 10 feet distant from them, which side-track connected with the main line of the Appleton branch of defendant's railroad. This side-track was put in by the company simply by request of one Reed, the owner of the lands upon which both these houses and track were situated, and the railroad company had no interest in the land on which the track was constructed, save such as might be obtained by such a mere license. The track was built to accommodate the owners of the ice-houses in shipping in materials and shipping out ice, and it was used for that purpose. The track was rudely built while the ground was frozen, and some of the pieces of boards and timber left on the ground from the building of the ice-houses were used in blocking up the ties. Prior to the burning of the ice-houses, both the plaintiff and the Jefferson Ice Company had shipped in sawdust in cars, which was unloaded in front of their respective ice-houses, and part of which had been necessarily scattered about the track and between the track and the ice-houses. Both ice companies had also purchased hay, which was unloaded from the wagons south of the track, and carried across the tracks on forks, so that a part of it was also scattered on the track and between the track and the houses. It was claimed on the trial by appellants that this *débris* had been cleaned up by the ice companies prior to the fire, but this evidence was contradicted by respondent's witnesses. On the day of the fire a strong wind was blowing across the track toward the ice-houses, and the inflammable materials in and about the roadbed were dry. A switch-engine was run down the side-track past the plaintiff's house and in front of or a little beyond the Jefferson ice-house. Within a few minutes a fire started. There is much evidence tending to show that it started between the rails of the railroad track in front of the Jefferson ice-house, and it was rapidly carried by the wind to the Jefferson ice-house, and from there to the plaintiff's ice-houses, all of which were destroyed; the apparent course of the fire corresponding with the direction of the wind.

The plaintiff claimed in its complaint that the fire was directly caused by the negligence of the defendant in the following respects: "(1) In the negligent manner of constructing its roadbed; (2) negligently leaving on its roadbed

quantities of chips, rubbish, and other inflammable materials; (3) negligently operating and running its locomotive; (4) in not providing its locomotive with any proper and sufficient appliances for the prevention of the escape and spread of fire therefrom; (5) carelessly switching and bumping the locomotive into other cars owned by the company standing on the track. That by reason of such negligence burning coals or cinders fell from the locomotive upon the combustible material placed and left upon the roadbed, setting the same on fire, which fire was communicated to adjoining property owned by the Jefferson Ice Company, and from thence communicated to the ice-houses of the plaintiff."

The defendant, by answer, alleged that the track was laid by virtue of a mere license, and at the request of and for the convenience of plaintiff, and that these facts, as well as the manner of its construction, were known to the plaintiff; that the inflammable material on the track was placed and left there by the plaintiff and by the Jefferson Ice Company, and not by defendant; and denied that it caused or set the fire.

Upon the trial the following special verdict was returned by the jury: (1) "Did Curtis Reed and wife, the owners of certain lands on Lake Winnebago, at Menasha, Wisconsin, through their son, W. W. Reed, on February 19, 1890, ask J. C. Spencer, vice-president of the Milwaukee & Northern Railroad Company, if said railroad company would lay a track on the land of said Curtis Reed and wife, to enable persons to ship ice therefrom, if they, the owners, could induce persons to put up ice thereon? Answer. Yes. (By direction of court.)" (2) "Did the defendant, through said Spencer, promise to lay a temporary track on the land of said Curtis Reed and wife in case parties should put up ice thereon, and, in case the business should become permanent, to lay a permanent track on a grade to be made by the owners of the land? A. Yes. (By direction of court.)" (3) "Was the track which was laid a temporary track, laid by the defendant upon the frozen ground, in pursuance of said arrangement between the owners of said land and said Spencer? A. Yes." (4) "Did the plaintiff ice company, after the defendant promised to lay said temporary track, knowing that other ice companies were putting up ice on said Reed's land, make an arrangement with the said Reeds to occupy a portion of said land, and store ice thereon for shipment? A. Yes." (5) "Was the property belonging to the Kurz & Huttenlocher Ice Company set on fire May 17, 1890, by a spark, cinder, or coal escaping from the engine of the defendant railroad company, which set on fire the adjoining ice-houses, the fire being communicated to Kurz & Huttenlocher's ice-houses? A. Yes."

(6) "Was the defendant, in the manner in which its roadbed was constructed, guilty of negligence which caused the destruction of the plaintiff's property? A. No." (7) "If the court should finally be of the opinion that the plaintiffs should recover, at what amount do you assess their damages? A. \$12,335.71." Upon this verdict judgment was rendered for defendant, from which plaintiffs appeal.

Miller, Noyes & Miller, for appellants.

C. H. Van Astine, for respondent.

WINSLOW, J.—The trial was long, and the exceptions taken were numerous. We shall review the case no further than is necessary to a discussion of certain questions fundamental to the case, upon which we think the conclusions of the trial court were erroneous.

1. The court refused to submit to the jury any question as to the alleged negligent construction, condition, or operation of the engine, and ruled that there was no evidence tending to show that there was any negligence on the part of the company in either respect. The evidence of defendant's employes was to the effect that the engine was provided with the most approved appliances to prevent the escape of fire; that these appliances were all in good condition, the dampers properly closed, and the ash-pan properly cleaned, at the time the engine passed over the track; and there was no positive evidence of any defect in the engine or its appliances on the part of the plaintiff. Now, it is urged by the defendant, in support of the ruling of the trial court, that science has not yet succeeded in constructing devices that will absolutely prevent the escape of minute marks from a locomotive at work, consequently that the mere fact that a fire was discovered soon after the engine passed (there being nothing to show the size of the spark or coal which caused it) is not sufficient to justify the jury in finding negligent construction, condition, or management of the engine, in the face of the great weight of affirmative testimony as to good condition and proper management, because the fire may have resulted from the presence of one of the minute sparks, which no appliance yet invented can arrest. In support of this argument, *Spaulding v. Railway Co.*, 30 Wis. 110, is cited. The case, however, is not like the *Spaulding Case* in some of its essential features. In the case at bar the evidence tended to show that the fire originated from a spark or coal dropped from the ash-pan. There was evidence from which the inference was strong that the fire started between the rails of the track. This was certainly a pretty satisfactory indication that the fire was not started by

Defective condition of engine—Question for jury.

a cinder from the smoke-stack, because such a spark, with the strong wind which the evidence tends to show was blowing, would probably have been blown to some distance from the track. There was also considerable evidence on the part of the defendant's employes that coals or cinders could not escape from the ash-pan if the pan was in proper condition, properly cleaned, and the dampers closed; some of the witnesses going so far as to say that the escape of coals or cinders from the ash-pan, under such circumstances, was impossible. The situation, then, was this: There was evidence from which two conclusions might properly be drawn by the jury, notwithstanding the positive testimony of defendant's employes as to the condition of the engine: *First*, that the fire was started by cinders escaping from the ash-pan; *second*, that no cinders or coal could escape from the ash-pan, if properly constructed and in proper condition. If these two facts were found, then the fire must have arisen because the ash-pan was either not properly constructed, or was out of repair, or not properly cleaned or managed, at the time of the passage of the engine over the track in question. These questions should certainly have been submitted to the jury. The case is identical in principle in this regard with the case of *Brusberg v. Railway Co.*, 55 Wis. 106, 7 Am. & Eng. R. Cas. 505.

2. The plaintiff submitted certain questions which it desired should be made a part of the special verdict, but none of which were incorporated in the verdict by the court. These questions were: (1) Whether the fire originated in combustible material placed and left on the track by the defendant; (2) if not, did the defendant know that the combustible material in which the fire originated was upon the track a length of time prior to the fire reasonably sufficient to prove the same, and neglect to do so? Touching the alleged negligence of the defendant, the court submitted but one question, namely, whether, by reason of the original negligent construction of the roadbed, the fire was occasioned. The effect of this was to eliminate from the case all questions of negligence on the part of the defendant except in the one respect named in the question last referred to. There was certainly evidence in the case tending to show that there was a considerable amount of chips along the track in front of the ice-houses, which had been made in course of the construction of the railroad, and in blocking up the ties, and which had been allowed to remain there by the railroad company. There was also evidence tending to show that there was much hay and sawdust scattered along the track at the place where the fire originated, which had been dropped there by the Jefferson Ice Company

Combustible
material on
track.

in unloading cars and loads of hay, and which had been allowed to remain by the railroad company; and a jury might reasonably find that no fire would have started but for the presence of one or both of these classes of inflammable material upon the track. It seems evident that, if this *débris* had been upon a part of the permanent right of way of the company, the question whether the company had exercised reasonable care in keeping its right of way free from inflammable material would have been one for the jury. *Gibbons v. Railroad Co.*, 66 Wis. 161, 25 Am. Eng. & R. Cas. 479.

In this case, however, it is insisted that because the railway company had only a naked license to lay its track, and had no interest in the land, it had no control over the premises covered by its rails and ties, and owed no duty to any one to remove combustible material. We have been referred to no case which lays down this principle, and, if there be any, we shall decline to follow it. In our opinion, the duty of the defendant company to take reasonable care of the track to prevent the starting of fires is not lifted from its shoulders by the fact that it did not own the right of way, but was simply a licensee. It built this track, and was using it for its own gain in the freights and tolls which it expected and was entitled to charge the ice companies. The track was rightfully laid. The company had a right to operate it and collect freights so long, at least, as its license was unrevoked. It would be strange to hold that the railroad company possessed all the substantial rights in the way of using the track and collecting its freights which it would have if it owned the right of way with none of the duties or liabilities which ordinarily result from such use. Is there any good reason for so holding? We think not. Assuredly the license to lay its track and operate its engines and cars carried with it necessarily the right and duty to put and keep its tracks in such condition that the business could be done with safety to its employés and its patrons. With the right which it enjoyed and was exercising for its own gain and profit goes hand in hand a correlative duty to use reasonable care to keep its tracks clear from inflammable material.

From these views it is clear that the court should have submitted in some appropriate form to the jury the question whether it negligently placed inflammable material upon its track, or negligently allowed such material to remain there, and whether, in either event, the fire in question originated in such inflammable material. Some of the material issues in the action not having been passed upon, a new trial will be necessary.

Judgment reversed, and cause remanded for a new trial.

Fires—Negligence of Railroad Company in Leaving Combustible Matter on Right of Way.—*Spencer v. Montana Cent. R. Co.* (Mont.), 49 Am. & Eng. R. Cas. 678, and note, 684; *Ft. Scott, W. & W. R. Co. v. Tubbs* (Kan.), 49 *Id.* 685.

Pleading—Negligence in Permitting Fire to Escape from Right of Way.—In an action against a railroad company for damages caused by fire, when the complaint alleges negligence in managing an engine, whereby combustibles on its right of way and on lands adjacent were set on fire, from which the fire, without any negligence of the plaintiff, spread to plaintiff's lands, and plaintiff's property was destroyed, it is not necessary to aver negligence of the defendant in permitting the fire to escape from its right of way. *Haugen v. Chicago, M. & St. R. R. Co.* (S. Dak., Dec. 8, 1892.), 53 N. W. Rep. 769.

GRISWOLD

v.

ILLINOIS CENTRAL R. Co.

(*Iowa Supreme Court, October 19, 1892.*)

Fires—Contract Exempting Company—Validity.—A contract between the owner of an elevator and grain-storage house and coal-sheds, operated largely for promoting the business of a railroad, and the railroad, exempting the latter from liability for damages by fire resulting from the negligent use of its engines, is void, under the Iowa Code, § 1289, providing that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railway," and § 1308, providing that carriers cannot exempt themselves from such liability by contract.

APPEAL from Buchanan district court.

R. W. Barger and *E. E. Hasner*, for appellants.

W. J. Knight, for appellee.

ROBINSON, C.J.—The facts disclosed by the pleadings, which are material for consideration on this appeal, are substantially as follows: On the 30th day of April, 1890, the plaintiff Griswold owned a two-and-one-half-story elevator building, warehouse, and corn-crib attached, together with engine and boiler connections and feed-mill therein, all of which were situated on the depot-grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped

from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the value of \$6000, and was at the time insured by the plaintiffs, the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company, in the sum of \$1000 each, or for the aggregate amount of \$4000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and claiming that, by reason of such payments, they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions: "And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said described premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good substantial elevator, coal-sheds, and lumber-yard on the above-described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad; and the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question.

The ground of the demurrer is as follows: "The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land along-

side of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employes. The plaintiffs, therefore, say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employes, and servants; and that said defence, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void." No special claims are made in behalf of the insurance companies; therefore their interests, and that of Griswold, for the purposes of this appeal, will be treated as governed by the same rules.

1. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway.

" * * * " It was said in *West v. Railway Co.*, 77 Iowa, 654, 38 Am. & Eng. R. Cas. 340, that this statute imposes an absolute liability upon railroad corporations, without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes, without fault on its part, is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway.

Section 1308 of the Code provides, in effect, that a common carrier, or carrier of passengers, cannot exempt itself from liability as such carrier by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence, in transporting passengers or freight, by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in *Cooley, Torts*, 687, with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply univer-

sally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

In *Johnson's Adm'x v. Railroad Co.* (Va.), 48 Am. & Eng. R. Cas. 442, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to or death of any of the members of the said firm, or of any of its agents or employes, sustained from said work, should such death or injury occur, from any cause whatsoever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done, where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are *quasi*-public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. *Railroad Co. v. Ryan*, 11 Kan. 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void as against public policy. *Thomas v. Railroad Co.*, 101 U. S. 71.

Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipments, including locomotives, engines, and of

operating its road without negligence. That is a duty which it owes to the public, and any agreement which seeks to lessen the diligence and care with which it furnishes and operates its road is to that extent against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement. Elevators, coal-sheds, and lumber-yards are important aids to a railway engaged in carrying grain, coal, and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal, and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt the controlling considerations which induced it to execute the lease. Those improvements were not only of value to defendant, but they were important to all who bought or sold commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in its subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid."

It is true that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. But when a contract belongs to that class it will be declared void, although in that particular instance no injury to the public may result. 5 Lawson, Rights, Rem. & Pr. § 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibitory by a statute, termed a contract against a public policy (or sound policy), is likewise void." Bish. Cont. § 473.

We do not find it necessary to go to the extent of holding,

as do some of the authorities cited, that the rule which invalidates a stipulation for exemption from liability for one's own negligence is of universal application, in order to support the conclusion which we reach that the provision under consideration is void. To require us to reach that conclusion, it is only necessary for it to appear that the provision, if effectual, would cause defendant to disregard and neglect a duty which it owes to the public, and thereby violates an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, there can be no doubt.

There is nothing in *Warren v. Railway Co.*, 41 Iowa, 484, in conflict with the conclusion we reach. That case involved the liability of the railway company for stock killed by it at a point where it had a right to fence. The company sought to escape liability on the ground that Bell, the owner of the pasture from which the stock escaped, had agreed with it to erect the fence and keep it in repair. But it was held that, as the owner of the stock was neither the owner of the pasture nor his tenant, the defence was not good. It was said by the court that, if Bell had agreed to erect and maintain the fence, he could not have recovered damages to his stock which resulted from the want of a fence; but the plaintiff in this case assumed no burden which the law imposed upon defendant. The case of *Simmonds v. Railroad Co.*, 52 Conn. 271, 23 Am. & Eng. R. Cas. 369, is in some respects somewhat similar in principle to that last cited. The case of *Railroad Co. v. Spear*, 44 Mich. 170, 7 Am. & Eng. R. Cas. 486, also cited by appellee involves a different question. It appeared in that case that the owners of a warehouse, of a railway track near it, and of a quantity of hay, employed a railway company to draw cars over the track for their accommodation. The engine employed to do the work was defective, and that fact was known to the owners aforesaid, who complained of it, but with that knowledge they continued to permit its use. It finally caused a fire, which destroyed the warehouse and hay. It was held that the owners of the property destroyed could not recover, for the reason that they had engaged the engine with knowledge of the defects which caused the loss. But in that case the plaintiffs not only owned the warehouse, but the track also, and the engine passed over that track, with their knowledge, and at their request, for their benefit. They knew in advance just what the danger to their property would be, and contributed to the result. But, putting upon the case a construction most favorable to appellee, and it is authority only for the doctrine that a railway company may exempt itself from liability to an individual on account of an existing and known defect in its machinery. Whether that may be done is a question

which does not arise in this case. The agreement under consideration does not seek to hold defendant harmless on account of known and specified defects in engines, or a manner of operating them, recognized to be negligent, but from "all liability for damages by fire" caused by cars or engines lawfully on the track, whatever the cause, whether then existing and known, or not then existing and not foreseen.

It is our opinion, for reasons stated, that the provision of the lease in question is contrary to public policy, and void.

The judgment of the district court is reversed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO.

v.

BARKER.

(*Kentucky Court of Appeals, February 16, 1898.*)

Fires—Burning Depot—Communicating Fire—Evidence.—A complaint against a railroad charged that the company negligently set fire, by sparks and coals from its locomotive, to the depot, which was dangerously combustible, as was known to the company, and that the fire extended to and consumed plaintiff's storehouse. The court struck out the charge that the depot was dangerously combustible, as was known to the company. *Held*, nevertheless, that evidence that the depot had a shingle roof and open eaves where the birds built nests of straw, and that it had often been fired before, was admissible.

Negligence in Using Shingle Roof on Depot.—Using a shingle roof on a depot is not in itself negligence, but where it has been frequently fired by sparks from passing trains, of which fact the company has knowledge, continuing the use of a spark-throwing locomotive near such depot, thereby firing it, becomes negligence.

Building near a Railroad—Danger of Fire—Contributory Negligence.—One is not guilty of negligence in building a house near a railroad track, so as to prevent a recovery if burned through the negligence of the company, though he knew that the danger of fire was thereby increased.

Fire Spreading—Proximate Cause.—If a railroad negligently permits sparks from its locomotive to set fire to its depot, whence it spreads to plaintiff's building, the company is liable. The cause of the burning is sufficiently proximate.

APPEAL from Pulaski circuit court.

C. B. Simrall, O. H. Waddle, and W. A. Morrow, for appellant.

W. O. Bradley and J. L. & J. W. Colyer, for appellees.

HAZELRIGG, J.—The Barkers, as plaintiffs in the court below, brought suit against the defendant, now appellant, alleging

that on the night of April 5, 1889, "the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which ^{Case stated.} extended to and consumed the storehouse of plaintiffs aforesaid; that said negligence of the defendant was the natural, probable, and proximate cause of the burning of their said house; and that by such negligent act of defendant they have been damaged three thousand dollars." They also made proper averments of ownership and possession of the burnt property, and its location and value. At the appearance term of the case, October, 1889, they filed an amended petition; and "the defendant, not being ready for trial, on account of the filing of said pleading," was given a continuance. The amendment charged that the defendant negligently erected and suffered and permitted its depot to remain near the track, although same, except the shed thereof, was covered with shingles, and constantly exposed to fire and sparks emitted from its locomotive, and notwithstanding the fact it was fully aware of such danger, and had been time and again notified of such danger, and knew that fire had been communicated to its said depot and other buildings, time and again, from such sparks and fire, all of which, plaintiffs charge, was gross negligence, and that by reason of which negligence the depot was burned, and the fire directly communicated to their building, consumed it, etc. Thereupon a demurrer was filed to this amended petition, and also a motion to strike out such parts of it as alleged that the defendant was aware of such danger, referring to the shingle roof, and the constant exposure to fire and sparks from the locomotive, and had been notified of such danger, and knew that fire had been communicated to the depot and other buildings, time and again, from such sparks and fire. .

At the April term, 1890, the court sustained the demurrer to the amended petition, making no order on the motion to strike out. The plaintiffs then filed their amended petition No. 2, alleging that the defendant carelessly and negligently set fire to its depot, "which depot was dangerously combustible," in said South Somerset, by reason of which, etc. On defendant's motion, and over the plaintiffs' objection, the words, "which depot was dangerously combustible," were stricken out by the court, and a demurrer to the petition as amended was overruled. The plaintiffs' cause of action, therefore, was this: "That the defendant negligently set fire, by sparks and coals from its locomotive to its depot, which consumed the same, and which extended to and consumed the storehouse of plaintiffs; that the defendant carelessly and negligently set fire to its depot, by reason of which

it was consumed, and the fire from which depot then and there communicated to and with the plaintiffs' building, and was the proximate, probable, and natural result of the carelessness and negligence of the defendant, as aforesaid." The defendant then, by one pleading, answered both the original and amended petitions, saying that it was "not true that on the night of April 5, 1889, it negligently set fire to its depot in Somerset, Ky., by sparks and coals of fire thrown from its locomotive, or that it carelessly and negligently set fire to said depot at the time mentioned and referred to in the petition," or that "the destruction of plaintiffs' property, referred to and described in the petition, was the proximate, probable, and natural result of its negligence, as alleged in the petition."

These were the pleadings on which the case proceeded to trial. Evidently the answer, so far as it attempted to traverse the allegations of the original petition, is, in strictness, not good for any purpose. It may mean that the company set fire to its depot by sparks and coals thrown from its locomotive, but not negligently, or it may mean that it negligently set fire to its depot, but not by sparks and coals thrown from its locomotive. The latter could hardly have been intended; and, taking it at its best, it is an admission that it set fire to its depot by sparks and coals from its locomotive, but did not do so negligently. In so far as it sought to traverse the statements of the amended petition, the answer, when liberally construed, simply says it is not true that the company negligently and carelessly set fire to its depot, manifestly admitting as a fact that it did fire the depot. Construed strictly, considering the conjunction "and," it might mean to admit that the company in fact fired the depot carelessly but not negligently, or negligently and not carelessly; but treating the words as synonyms, considered as a whole, we think the answer must be taken to be a statement that the company in fact set fire to its depot by sparks and coals thrown from its locomotive, but did not do so negligently or carelessly.

The plaintiffs' proof was to the effect that on the night in question engine No. 58 was fired up, and left a point in Somerset south of the depot a few hundred yards, pulling northwardly a number of loaded cars; that when it passed the depot it emitted sparks and coals in large quantities, which floated up, over, and on the depot, and that shortly thereafter the shingle roof of the structure was seen to be on fire, the flames spread rapidly, and soon set fire to the house of plaintiffs, which was immediately across the street from the depot—a distance of 45 feet; that the weather was warm, and there were no fires being kept in the depot building. Plaintiffs also introduced some proof conducing to show that the locomotive

used was not supplied with the most improved fire-screen and spark-arrester; that it slipped badly when on the track in front of the depot, as if it were overloaded; that it worked hard, and threw sparks in unreasonably large quantities. Under the permission of the court, and over the objection of the defendant, the plaintiffs proved that the building was in part covered with shingles, and that there were spaces under the eaves of the building where birds had located their nests, and that on several former occasions, in warm weather, when there were no fires in the depot, the same roof had caught on fire just after a passing train, and that the defendant knew of this, and had in fact repaired the burnt roof. The defendant's testimony showed that their engine, and its screen and spark-arrester, were of the most improved patterns in use or known to science; that the train was not loaded unusually heavy; that coal, and not wood, was used in firing the engine; that no sparks were emitted; there was no slipping on the track, or any derangement of the engine. Moreover, that the fire was seen inside the depot, burning more fiercely than on the outside; may have caught from the inside; that the night was cool, and there was a fire in at least one of the rooms in the building. Its chief carpenter and superintendent of buildings fully explained the construction of the depot, which was covered partly with tin and partly with shingles; and there were no spaces under the eaves where birds could find lodgement for nests. Under this state of case, the jury, after instruction, found for the plaintiffs the sum of \$2875.

It is insisted by counsel for the appellant that although the court had by its action in sustaining the demurrer to the first-amended petition, and in striking out the words, "the depot was dangerously combustible," from the second-amended petition, narrowed the issue to the negligent setting on fire of defendant's depot, yet the trial was allowed to proceed, both as to the evidence and the instructions, upon the theory that plaintiffs' cause of action, as set forth in their pleadings, included or was founded on negligence growing out of the combustible character of the material in the depot, and on the assumption that such fact was known to the defendant. And it must be conceded that, unless this testimony with regard to the combustible nature of the depot legitimately and properly elucidates the issue as made by the pleadings, the defendant was prejudiced by its introduction. Why was it that the learned judge below, at defendant's instance, or on its motion, sustained the demurrer to the amended petition, setting up the very facts which were admitted by the court as evidence on the trial, and why strike out the words respecting the dan-

Evidence as to
depot-roof.

gerous combustible character of the depot in the second amendment, when proof was immediately admitted before the jury regarding the shingle roof, and the open eaves and birds' nests of straw, etc.? Manifestly, because the setting fire to the depot negligently, or the negligence in setting fire to the depot, by the sparks, depended on the character of the building alleged to have been set afire. Negligence is the leading thought. The instrumentality or active agent of negligence was the locomotive throwing sparks, but upon what? On a tin roof, or on a clean, plowed field, or on a straw stack, or on a depot covered with straw, or on one covered with shingles, and constructed with open eaves? Clearly, the negligence in setting fire to a thing by a locomotive depends on the condition, not alone of the machine itself, but on the uses it is being put to—the location, the surroundings; and these are matters of evidence. The combustibility of the depot was one of the circumstances bearing on the fact of whether the depot was actually fired by the sparks. Had the building been fully fire-proof, would not that fact have furnished evidence against its being set on fire by the sparks?

We do not pretend to decide that the mere fact that the depot was covered with shingles is of itself evidence of negligence. It is not ordinarily so. But when situated so that from some reason it is frequently fired by passing trains, and coupled with the significant proof that the defendant was aware of the combustible material of which the roof was composed, and that it had before been fired by sparks, we are fully prepared to say that if defendant used a spark-throwing locomotive in proximity to such a roof, and fired it, it would be "negligently setting fire to the depot by sparks thrown from its locomotive." With the fact conceded, that defendant fired the depot by sparks thrown from its engine; with the fact establishing that an unusual number of sparks were thrown on the night in question indicates a derangement of the spark-arrester; with the knowledge and information brought home to the defendant respecting the previous fires, and the dangerous quality of the pine and poplar shingles on the roof of the depot in dry weather,—we are of opinion that the instructions on the subject of the construction of the depot could not have been misleading to the jury. The first instruction reads as follows: "If you believe from the evidence that the depot of the defendant at Somerset on the night of April 5, 1889, was burned by reason of the negligence of defendant in the construction of its engine, or in the construction of its depot, or in the management of its engines, and the burning of plaintiff's house was the natural and probable consequence, you

Negligence of
defendant.

will find for the plaintiff; and, unless you so believe, you will find for the defendant." The only chance for misapprehension here on the part of the jury was in considering the meaning of "negligence in the construction of its depot;" and this was not considered abstractly. No one could know what the expression would mean, or intended to mean, unless in connection with the proof; and when so considered, and the proof in the case applied to the language, it is deprived of any ambiguous or misleading feature; and this, we think, is true of the second instruction, which embraces this same expression. The depot was admittedly fired by sparks from the engine; and whether it had in fact a shingle roof, or other kind, or open or closed eaves, and in whatever way it might have been constructed, the verdict could not reasonably have been anything else, under the pleadings.

Instruction A, asked by defendant, precluded plaintiffs' recovery if they built their house prior to the building of the depot, and knew of its exposure to fire, etc., and is not the law. "A landowner's erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence." *Pierce, R. R. p. 435.*

Contributory
negligence.

Instructions B and F were, in effect, given by the court. C and E, on the question of burden of proof, was wholly inapplicable; and instruction D, offered on the care necessary to be used, was substantially given in the one defining negligence.

Proximate
cause.

Nor is there any doubt as to the injury being sufficiently proximate. "The ignition for which the company is liable need not take place from the very particles of fire thrown out by its engines." If the fire spreads from the matter first ignited, the intervention of considerable space, diversity of ownership, or various physical objects, etc., does not preclude recovery by the parties injured, or affect the company's liability for its first negligent act. *Pierce, R. R. p. 441.*

Upon the whole case, we think there has been no error prejudicial to the substantial rights of the appellant.

The judgment is therefore affirmed.

Fires—Contributory Negligence in Stacking Hay near Track—Pleading.—The complaint in an action to recover for hay destroyed by fire showed that the hay was stacked near defendant's right of way, but contained the general allegation that the hay was destroyed without negligence of the owner. It was held that such complaint was not demurrable as showing on its face contributory negligence. *Phoenix Ins. Co. v. Pennsylvania Co. (Ind.), 33 N. E. Rep. 970.*

MARTIN

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

(55 *Arkansas*, 510.)

Fires—Failure to Move Cotton—Proximate Cause.—Defendant railroad company contracted with a compress company to furnish cars and carry cotton from a place of storage to the compress. Owing to a press of business cars were not furnished in sufficient numbers to move the cotton, and by reason of the delay a considerable quantity accumulated about the sheds and grounds of the compress company, which was consumed by fire. The fire extended to, and consumed also, plaintiff's warehouse. *Held*, that the failure of the railroad to furnish sufficient transportation for the cotton was not the direct and proximate cause of the fire, and did not render the company liable.

Same—Liability after Issuing Bills of Lading.—Permitting the cotton to remain where it was burned, after bills of lading were issued therefor, would not render the company liable, where it had not actually assumed possession or control of the same.

Same—Estoppel.—The railroad company was not estopped from denying that it had assumed possession of the cotton for which it had issued bills of lading, by reason of the Ark. act of March 15, 1887, prohibiting warehousemen and carriers from issuing receipts or bills of lading, except for goods actually received into their possession. The object of the act does not extend beyond protection of holders of such receipts or bills of lading.

Same—Evidence of Other Fires.—Where it appeared that the fire did not have its origin in sparks from defendant's locomotive, it was not prejudicial error to exclude evidence that cotton similarly stored had previously caught fire from such sparks.

APPEAL from Pulaski circuit court.

U. M. & G. B. Rose, E. W. Kimball, and S. R. Allen, for appellants.

Dodge & Johnson, for appellee.

BATTLE, J.—This action was brought by C. F. Martin & Co. and 13 insurance companies against the St. Louis, Iron Mountain & Southern Railway Company for the

Case stated.

recovery of damages caused by a fire. They allege in their complaint "that on November 14, 1887, the plaintiffs C. F. Martin & Co. were the owners of 1600 bales of cotton, valued at \$80,000, and of a certain building, valued at \$4500, and fixtures to the value of \$1500, and all of the value of \$84,500, the cotton being stored between Elm street and the river, and between Main street and Cumberland street, and

the building being situated on lot 1, block 1, in the city of Little Rock. That on the 14th day of November, 1887, the defendant was a common carrier of goods for hire, and operated a railroad at Little Rock, and had a large number of bales of cotton in its possession, which it negligently held and kept in and about the warehouse and sheds of the Union Compress Company, at the north end of Main street, in said city, in a most dangerous and hazardous place and manner, and close to the track of its said road, which cotton was on said day negligently destroyed by a fire, which was caused by the defendant by reason of its carelessness and negligence in storing and keeping said cotton and operating its said road; which fire the defendant, by the use of due care, could have prevented and stayed, but did not, and which fire, by the negligence of the defendant, was carelessly communicated to said property of the plaintiffs, and by it negligently burned and destroyed, without any fault of the plaintiffs or any of them."

They further allege that this cotton was insured, prior to the fire, by the 13 insurance companies who are plaintiffs, to the aggregate amount of \$61,227.73; that these companies had paid the various amounts for which they were severally liable on account of the insurance of the cotton destroyed, and had become subrogated to the rights of Martin & Co. to recover damages on account of the fire, to that extent.

The defendant answered, and, among other things, denied that the fire on the 14th of November, 1887, was caused by or through any acts of neglect or carelessness on its part, or on the part of any of its agents, servants, or employés; that the cotton and building, or either of them, were burned or destroyed by reason of the negligence or carelessness on its part; or that it had in its possession or control any cotton in or about the warehouse or sheds of the Union Compress Company at the north end of Main street, or on said street, in the city of Little Rock.

The evidence adduced by the plaintiffs at the trial tended to prove the following facts: On the 14th of November, 1887, and before that time, the Union Compress Company mentioned in the complaint had a warehouse and sheds at the foot of Main street, in the city of Little Rock. The warehouse and sheds were on both sides of Main street, lying close up to the track of the railroad. The compress company had laid a floor or platform over the end of Main street, up to the railway track, and beneath this floor, a few feet higher than the railroad track, had another floor. In the upper floor, over the end of Main street, there was an opening, and from this opening a stairway led down to the lower floor. On the 14th of November, 1887, cotton was stored in the warehouse and

sheds from the east side, and across Main street, and many feet to the west. The upper platform, over the end of Main street, and the one beneath, were both occupied by cotton. A narrow footway on the upper platform to the stairway was kept open, and bales of cotton were piled on each side. A narrow way from the stairway across the lower floor or platform was left open for persons to pass to the railway and river. Cotton was also piled on each side of this way, and close up to the stairway. The cotton stored in the warehouse and sheds, including the platforms at the end of Main street, was about 3900 bales.

There were two railway tracks of the defendant north of the warehouse of the compress company, extending its entire length, being at the nearest point five feet from the warehouse and sheds, and a few feet below the lower floor of the same. On this track many locomotives passed daily. On the 14th of November, 1887, one passed as late as 2.40 in the afternoon.

West of Main street, and north of the railway track, was a building known as the "Boathouse," which was used and occupied by the Athletic Association. At the north end of Main street was the Arkansas River, at which point there was a landing for skiffs plying between Little Rock on the south, and Argenta on the north side of the river. The footways were left open, and the stairway was built by the compress company for a way for persons to pass and repass in going to and from the railway, the boathouse, and skiff-landing. It was used for this purpose by many persons, and while passing along this way some of them smoked cigars or cigarettes.

On the 14th of November, 1887, Martin & Co. owned a building and about 1600 bales of cotton. The building was situated and the cotton was stored a short distance from the warehouses, sheds, and platforms of the Union Compress Company.

On the day mentioned it was very dry, and it had not rained for some time previous. The bagging on many of the bales which were stored with the compress company, if not all, had been cut in places for the purpose of inspection, and loose cotton protruded therefrom. It was not kept wet, and there was nothing spread over it to protect it. In the afternoon of the 14th of November, 1887, between 4 and 5 o'clock, it caught fire. The fire spread rapidly, and soon consumed the warehouse, sheds, and platforms of the compress company, and the cotton stored in and on the same, and in a short time extended to and destroyed the cotton and building of Martin & Co.

To show that the defendant was responsible for the losses

caused by the fire, the plaintiffs introduced evidence tending to prove the following facts :

First. The Union Compress Company was engaged in compressing cotton for shipment. Its place for receiving cotton in Little Rock was at its warehouse, platform, and sheds at the foot of Main street, where the fire in question occurred. Its machinery for compressing was across the river at Argenta. It was necessary to transport the cotton from the Main street warehouse, sheds, and platforms to the compress at Argenta. To do this it made a contract with the defendant, by which the defendant undertook to furnish cars to transport the cotton, and, when loaded, to haul the same to the compress in Argenta, the compress company paying therefor at the rate of two dollars a carload. The compress company repeatedly demanded cars for transportation under its contract. On account of the unusual demand for cars for the transportation of cotton, the defendant failed to furnish the cars necessary to move the cotton, and on account of this failure the cotton accumulated to the extent it did. The compress company could have handled and safely stored all cotton at Main street, if transportation had been furnished as demanded. But the cotton could not have been handled in Argenta, if it had been hauled to the Argenta compress from the foot of Main street, because it (compress) was "blocked with cotton."

Second. The cotton stored at the foot of Main street was received for compression. When the owner or shipper stored it, the compress company would give a receipt, stating therein that it was received for compression. When the owners wished to ship it, they would take these receipts to a railroad company, and the company would take them, holding them against the compress company, and issue its bill of lading to the owner. The railroad company would thereupon notify the compress company of this fact, with directions to insure, compress, and load the cotton upon its cars for shipment. This was the custom of the Little Rock & Memphis and the St. Louis, Iron Mountain & Southern Railway Companies. When the defendant issued a bill of lading it had the right to have the cotton compressed where and by whom it liked, or ship it as it was if it liked. It executed bills of lading for cotton which was burned while stored with the compress company as early as the 20th of October, and as late as the 14th of November, 1887, the day of the fire. Bills of lading for 410 bales were executed in October, and for 1050 in November. For the larger portion of the cotton the bills of lading were executed between the 7th and 14th of November. The Little Rock & Memphis Railway Company had issued

bills of lading for about 1200 bales of the cotton, which was burned as before stated.

Before the defendant adduced any evidence, the plaintiffs offered to prove by Dorsey Allen that defendant's locomotives had set fire to cotton in the immediate vicinity in which the fire occurred on several occasions shortly before the 14th of November, 1887, and, the defendant objecting, the court refused to allow them to do so, and they excepted.

Upon the evidence we have stated, the plaintiffs asked and the court refused to instruct the jury as follows :

Instructions. (1) "If the jury find from the evidence that the defendant, on the 14th day of November, 1887, was a common carrier of freight for hire, and operated a line of railroad in Little Rock, on the river-front, between the warehouses and the sheds of the Union Compress Company and the river, and held a large and unusual number of bales of cotton which had been split open, leaving cotton exposed, which it kept in a negligent and careless manner, in and about said warehouses and sheds on Main street, in said city, and that said cotton was a highly inflammable material, and the place where it was kept was partly on a public street of Little Rock, where many citizens, with knowledge of the defendant or its servants, agents, or employés, were constantly passing, and lighting and smoking cigars and cigarettes, and that said cotton was kept by the defendants within a few feet of its line of railroad, where its engines were frequently passing, and that it was when the season of the year was very dry; and if they find that the defendant had contracted to remove the cotton across the river in a reasonable time, and that said cotton was so kept at said place by the defendant for an unusual length of time, because of the defendant's inability to furnish transportation after its bills of lading were issued; and that said loss was caused by the negligence of the defendant * * * in keeping said cotton at said place under the circumstances, and such fire was communicated to the property of the plaintiff, and it was burned as a probable and proximate result of said fire,—then the jury should find for the plaintiff." (2) "If you find from the evidence that the defendant railroad company, by its agents, gave bills of lading for the cotton at the compress shed or building, you are instructed, as a matter of law, that the cotton so covered by bills of lading was under the control of the defendant company; and, if you find from the evidence that the plaintiff's property was destroyed through the negligence of the defendant company, its officers, agents, or employés, in not properly caring for, watching, and protecting the cotton held by it under bills of lading, and that the fire was the result of the negligence of the defendant company, its officers,

agents, or employes, you will find for the plaintiffs." (3) "If the jury find from the evidence that the defendant took up the receipts of the Union Compress Company for cotton left at their warehouse and sheds, on Main street, by the owners for compression, and thereupon issued its bills of lading for said cotton, by which the defendant agreed to transport the same to its destination, and then directed said compress company to insure said cotton for the benefit of the defendant, and to compress the same and ship it out, for which insurance, handling, compressing, and shipping out the defendant had agreed to pay said compress company, the jury will be warranted in finding that the compress company was the agent of the defendant while so holding such cotton for such purposes after the bills of lading were so issued, and the defendant is responsible for any negligence of the compress company which caused the fire, while the compress company was acting in its line of duty and employment, as such agent, respecting said cotton." (4) "If the jury find from the evidence that the defendant knowingly issued its bills of lading for a large number of bales of cotton when in the warehouses and sheds of the Union Compress Company, it thereby adopted such warehouses and sheds as its own, and if, in fact, the sheds were not its own, and not under its control, it is, by virtue of chapter 60 of the Acts of 1887, estopped from denying that said cotton was on its own premises and under its control." (5) " * * * If you find from the evidence that the railroad company receipted for and gave bills of lading for cotton which was upon * * * ground contiguous thereto [its right of way], and upon which it was accustomed to accept cotton for transportation, and allowed the same to remain there for an undue period of time before removing the same, and that cotton is an inflammable substance, this is a circumstance from which the jury may infer negligence against the defendant.

Other instructions were asked for by the plaintiffs, and refused by the court, which were covered by instructions given. The court gave instructions, over the objection of the plaintiffs, to the converse of those copied above.

The jury returned a verdict in favor of the defendant, and in response to the question, "Do you find that the cotton in the warehouse of the compress company was set on fire by an engine or train of defendants?" propounded to them, answered "No." Judgment was rendered accordingly, and plaintiffs appealed.

The first request of plaintiffs for instructions which was refused by the court refers, in ambiguous terms, to the oral contract of the defendant with the Union Compress Company

to furnish cars, and to haul the same, when loaded with cotton, across the river to the compress in Argenta. The reason for this reference is not apparent, unless it be the purpose of impressing the minds of the jury, if granted, with the belief that the defendant was responsible for the losses caused by the fire, because it failed to perform its contract with the compress company. If such be its meaning, object, or intent, should it have been granted?

The mere failure of the defendant to perform its contract with the compress company was in no wise the juridical cause of the fire. There was no direct connection between the neglect of the defendant to furnish transportation according to its contract and the fire.

Proximate
cause of fire.

The failure to furnish cars was one of a series of antecedent events without which, as the result proves, the fire, probably, would not have happened; for, if the cotton had been removed, there might have been no fire. But it was not the direct and proximate cause, and did not make the defendant responsible for losses caused by the fire. *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 49 Am. & Eng. R. Cas. 137.

There was no evidence that the defendant was in the actual possession or control of the cotton stored in the warehouse and sheds and on the platforms of the Union Compress Company at the north end of Main street, but the truth is the compress company had such possession and control. The theory upon which this action was prosecuted, as shown by the complaint and the refused requests of plaintiffs for instructions, was that the defendant is conclusively presumed to have been in possession of the cotton for which it executed bills of lading, and that it had made the place where the cotton was burned a receiving station for its railroad, and the compress company its agent to receive and hold the cotton. Is this theory correct?

All liability for an injury sustained is based upon the theory that the party liable has committed a wrong or neglected a duty. Upon this theory a principal is held liable for the acts or negligence of his agent, and the master for those of his servant. Their liability is based upon their right to direct and control the actions of the agent or servant in the scope of his employment. As an incident to this right, the duty rests upon them to so direct and control such acts of the agent or servant that no injury may be done to third persons. For the damages occasioned by a failure to discharge this duty they are liable.

The relation between parties by which responsibility attaches to one for the acts or negligence of the other must be

that of principal and agent, or master and servant, in which the one is subject to the control of the other. When a party "using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the former retains no right or power to control or direct the manner in which the service shall be performed," no relation of principal and agent or master and servant arises; and the former incurs no liability for the negligence of the latter, his agent or servant, in the performance of the contract. In such a case the latter only represents the will of his employer as to the result of his work, and as to such means and methods is not a servant, but a master, and for negligence therein is alone amenable. *Mechem, Ag. § 747, and cases cited.*

But this rule of immunity from liability is not without its qualifications. If the thing to be is in itself unlawful, or a nuisance *per se*, or probably cannot be done without necessarily doing damage, the person causing it to be done by another is as much liable for injuries suffered by third persons from the act done as he would be had he done the act in person. But if the converse be true, that is, the act is in itself lawful, is not a nuisance *per se*, and can probably be done without necessarily causing damage, and is not a duty imposed by law on the employer, and the injury results from the negligence of the contractor or his servant in the performance of the service undertaken, the contractor is alone liable. *Railway Co. v. Yonley*, 53 Ark. 503, 45 Am. & Eng. R. Cas. 578; *Ellis v. Gas Consumers' Co.*, 2 El. & Bl. 767; *Peachey v. Rowland*, 13 C. B. 182; *Hole v. Railway Co.*, 6 Hurl. & N. 488; *Steel v. Railway Co.*, 16 C. B. (N. S.) 550; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Reedie v. Railroad Co.*, 4 Exch. 244; *Knight v. Fox*, 5 Exch. 721; *Milligan v. Wedge*, 12 Adol. & E. 737; *Overton v. Freeman*, 11 C. B. 867; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Chicago City v. Robbins*, 2 Black, 418; *Storrs v. City of Utica*, 17 N. Y. 104; *Scammon v. City of Chicago*, 25 Ill. 424; *McGuire v. Grant*, 25 N. J. Law, 356; *Hilliard v. Richardson*, 3 Gray, 349; *Painter v. Mayor*, 46 Pa. St. 213; *Allen v. Willard*, 57 Pa. St. 374; *De Forrest v. Wright*, 2 Mich. 368; *Pfau v. Williamson*, 63 Ill. 16; *City of Logansport v. Dick*, 70 Ind. 79, and authorities cited.

In this case the Union Compress Company exercised a distinct and independent employment. It was engaged in the business of compressing cotton. It received cotton indiscriminately from the owners for compression, and gave them a

receipt for it, and stored it as it saw fit. At the time of the fire in question it had stored for compression at the north end of Main street 3900 bales of cotton, of which the defendant and the Little Rock & Memphis Railway Company had executed bills of lading for 2660 bales—the defendant for 1460 and the Little Rock & Memphis Railway Company for about 1200. It does not appear who held the receipts of the compress company for the remaining 1240 bales. None of it, it seems, was stored for compression in the first instance by either of the railroad companies mentioned. Their bills of lading were severally executed by them after the cotton had been stored and receipted for by the compress company. The course of conduct pursued by the defendant in respect to this cotton was: When the owner requested, it gave bills of lading in exchange for the receipts of the compress company, and immediately notified the company of the fact, and directed it to compress, and put the cotton on the cars for shipment. The cotton was not actually delivered to the defendant for shipment until it was compressed; neither was it understood that it should be. There was no evidence tending to prove that the defendant exercised any control over the cotton, until it was loaded upon its cars, or over the place where it was kept. Until it was placed upon its cars it assumed no care or custody of it. All that it acquired was the right to ultimate possession, which passed to it by the original depositors transferring to it the receipts of the compress company. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387.

But it is contended that because an act of the general assembly of this state, entitled "An act to regulate the duties of warehousemen, transportation companies, and others," approved March 15, 1887, prohibits all warehousemen and carriers, under a penalty, from issuing receipts or bills of lading, except for goods actually received into their possession, the defendant was estopped to deny that it had the possession of the cotton for which its bills of lading had been issued. But we do not think so. The act was passed to protect *bona fide* holders of the receipts of warehousemen and bills of lading of carriers. Prior to the passage of this act it had been held by the Supreme Court of the United States that the master of a vessel or the agent of a railroad company has no authority to sign a bill of lading for goods not actually put on board of the vessel, or actually delivered for transportation; and, if he does so, his act does not bind the owner of the ship, or the railroad company, as the case may be, even in favor of a *bona fide* purchaser of the goods. *The Freeman*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7; Rail-

Estoppel—
Statute.

way Co. v. Knight, 122 U. S. 79, 87, 30 Am. & Eng. R. Cas. 88. The same doctrine was held by other courts of last resort, while by a few it was repudiated. In this state the law, in this respect, was unsettled until the act of March 15th was enacted.

In order to protect the holders of bills of lading given by carriers for goods, this act, among other things, provides "that no master, owner, or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give away any bill of lading, receipt, or other voucher or document for any merchandise or property by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car, or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the same time actually on board or delivered to such boat, vessel, or car, or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading, receipt, or other voucher or document."

It further provides that such bills of lading and receipts shall be negotiable by written indorsement thereon, and the delivery thereof so indorsed, and that any and all persons to whom the same may be transferred shall be deemed and held to be the owner of the property for which the same were given, "so far as to give validity to any pledge, lien, or transfer given, made, or created thereby, as on the faith thereof; and that no property so stored or deposited, as specified in such bills of lading or receipt, shall be delivered, except on the surrender and cancellation of such receipts and bills of lading;" and that every person aggrieved by any violation of the act may maintain an action against the person or corporation violating it, to recover all the damages he may sustain by reason of the violation.

The main object of the act is to fix the liability of warehousemen, common carriers, and other persons named in the act to the holders of their receipts or bills of lading. To do this it prohibits them from issuing the same, except for property in their actual possession, and from selling or incumbering, shipping or transferring, or permitting to be shipped, transferred, or removed beyond their control, the property for which a receipt or bill of lading has been given, without the written assent of the person or persons holding such receipt or bill of lading. Their liability for a violation of the act is limited to the persons aggrieved, who are the persons interested in the property described in the receipt or bill of lading.

It does not undertake to define the duties and liabilities of the warehousemen, carriers, and other persons named therein to third persons, and does not change their rights, relations, duties, or liabilities to such persons, but leaves them as they were before its enactment. Hence there is nothing in the act, or policy of the act, to estop them from showing, in actions like this, that the property for which their receipts or bills of lading were given was not in their actual possession.

If the Union Compress Company exercised a distinct and independent employment, and the cotton was in its custody, control, and possession, and the defendant had no right to control or direct it in the management and storage of the cotton in question, it was not responsible for its (compress company's) acts or negligence as principal or master. There was no evidence of such a right; neither was it claimed or alleged; nor was there any evidence to show that the storage of the cotton with the compress company was a nuisance *per se*, but, on the contrary, it was alleged by the plaintiffs in their complaint that it was "negligently destroyed by fire, which was caused by the defendant by reason of its carelessness and negligence in storing and keeping said cotton, and operating its said road, which fire the defendant, by the use of due care, could have prevented and stayed;" clearly admitting that the fire resulted from the manner in which the cotton was stored and kept, and that it could have been prevented by due care. Moreover, there was no evidence that any of the cotton for which defendant executed bills of lading was placed and kept in the street.

The instructions asked for by the plaintiffs were properly refused. *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 49 Am. & Eng. R. Cas. 137.

The refusal of the court to admit the testimony of Dorsey Allen, if it was competent for any purpose, was not prejudicial to any one. The uncontradicted evidence adduced at the trial showed that no locomotive had passed the cotton at the foot of Main street later than 2.40 in the afternoon of the day on which the fire occurred, and that, this being true, the fire could not have been caused by a locomotive.

Immaterial
evidence.

Judgment affirmed.

Action for Fire—Pleading in Justice's Court.—Under a statute providing that no formal pleadings shall be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in an action for damages caused by fire set by a locomotive, which does not allege negligence, is sufficient on objection raised after verdict. *Folhaus v. Atchison, T. & S. F. R. Co.* (Mo., May 8, 1893.), 22 S. W. Rep. 478.

SMITH

v.

CHICAGO, MILWAUKEE & ST. PAUL R. Co.

(South Dakota Supreme Court, June 26, 1898.)

Fires—Defective Locomotive—Special Finding—Allegations in Complaint.—A special finding of a jury that the negligence of the defendant which caused the damage to the plaintiff was the condition of its locomotive engine is within the allegations of the complaint, alleging that "the defendant carelessly and negligently ran an engine along its line of railway, which engine then and there was so negligently and insufficiently constructed and equipped, and then and there was so negligently and carelessly operated by the defendant, that it emitted and threw out large sparks of fire."

Defective Spark-arrester—Allegations in Complaint.—An allegation in plaintiff's complaint that the defendant's engine "was so negligently, carelessly, and insufficiently constructed and equipped" as to emit and throw out large sparks of fire properly included the condition of such engine for arresting sparks, whether its defects in that respect resulted from its original construction, or from defects caused by use, wear, or injury to its parts.

Evidence of Other Fires—Rebuttal.—Evidence tending to prove that a locomotive engine which caused a fire destroying plaintiff's property also set two other fires about the same time is not necessarily overcome by evidence that the engine was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer, as a matter of law. Such evidence tends to raise a conflict in the evidence as to the negligence of the defendant, which must be determined by the jury; and this court cannot say that the jury, from such evidence, were not justified in finding that the engine was not in good condition.

Same—Instructions to Jury.—Whether or not evidence tending to prove the setting of two other fires about the same time by the engine that caused the destruction of plaintiff's property is admissible as tending to prove negligence on the part of the defendant is a question of law for the court; and an instruction by the court to the jury that such evidence was admissible for the purpose stated is proper, and the fact that this instruction is repeated in an instruction given upon the request of plaintiff's counsel does not constitute error.

The Burden of Proving Contributory Negligence on the part of the plaintiff rests upon the defendant, unless the plaintiff, in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence; and when there is no evidence upon the subject, it is the duty of the court to assume that the plaintiff was not guilty of such contributory negligence, and so instruct the jury.

APPEAL from Bon Homme circuit court.

R. B. Tripp (*H. H. Field*, of counsel), for appellant.
French & Orvis, for respondent.

CORSON, J.—This was an action to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant, in permitting sparks to escape from its engine used on the line of its railway, whereby a quantity of hay belonging to the plaintiff was destroyed. Verdict and judgment for plaintiff. Defendant appeals.

1. The first question presented is as to the effect of certain special findings of the jury, made in connection with their general verdict, which are as follows: "Special : (1) Did the fire that destroyed plaintiff's hay start from sparks emitted by defendant's engine?"

Special findings—Defective engine.

Answer. Yes. (2) If your answer to the last question be 'Yes,' were the sparks emitted through the negligence of the defendant? A. Yes. (3) Was the plaintiff's loss due to the negligence of the defendant? A. Yes. (4) If your answer to the last two questions be 'Yes,' in what did the negligence consist? First. Was it in the construction of the engine? Second. In its condition or equipment? Third. Its operation? A. In its condition." The learned counsel for the appellant contends that "the defendant is charged with being negligent in respect to the construction, equipment, and operation of the engine. The jury specially find that the defendant was not negligent in any one of these respects, but that it was negligent in regard to the condition of the engine. * * * They were directed by the court, upon the enumeration of all of the kinds of negligence alleged, together with another not alleged, to state in what the negligence consisted, and they say it was in one of the particulars of this enumeration only. This necessarily excludes the others, and is a special finding by them that the defendant was not negligent in any of the others enumerated. This being so, on reference to the complaint and findings it will be seen the defendant was acquitted of all negligence charged in the complaint." The allegation of the complaint upon the subject of the negligence complained of is "that on said date the defendant carelessly and negligently ran a locomotive engine along said line of railway, which engine was then and there so negligently and insufficiently constructed and equipped, and then and there was so carelessly and negligently operated by the defendant, that it emitted and threw out large sparks of fire," etc. The learned court below evidently construed the term "condition," in the findings, as applied to the engine, as embraced in the allegations of the complaint. While, strictly speaking, "equipped" has reference to the appliances to make the engine effective for the purposes for which it is intended, and "condition" has reference to the state these appliances are in for accomplishing the purposes intended, yet in common

language this distinction is not usually observed, in speaking of a locomotive engine. It would doubtless be difficult for ordinary minds to comprehend the distinction between an engine not properly equipped for arresting sparks and one not in condition to arrest them. If properly equipped,—that is, supplied with whatever may be necessary to efficient action,—it would be, under ordinary circumstances, in condition to arrest sparks. If not in such condition, it would not be properly equipped to accomplish the purposes designed.

We are of the opinion, therefore, that the court committed no error in holding that the finding substantially corresponded with the complaint. More especially is this so in this case, as the defendant tried the cause in the court below upon the theory that the condition of the engine was in issue, as fully appears from an examination of the testimony on the part of the defendant. Mr. Whitney, the engineer who ran the engine at the time of the fire, after testifying as to the manner of the construction of the engine and its appliances for arresting sparks, etc., was asked: "You observed the condition of the engine at that time, did you? Yes, sir. What was its condition at that time? It was O. K. What do you mean by that? It was in good condition." The fireman and other witnesses were asked similar questions by counsel for defendant. We think it is too late, therefore, to make the point that the findings did not substantially conform to the pleadings, and we are of the opinion that by a fair construction of the complaint the allegation that the defendant's engine "was so negligently, carelessly, and insufficiently constructed and equipped" did necessarily include its condition for arresting sparks, whether its defects in that respect resulted from its original construction, or from defects caused by use, wear, or injury to its parts. In either case it would not be properly equipped for the purpose for which it was intended. This finding then established the fact that defendant's engine was not in proper condition for arresting sparks.

2. It is further contended, however, by counsel for the appellant, that this finding of the jury is not supported by the evidence, and ought to have been set aside by the trial court, as the evidence on the part of the defendant established the fact that the engine was properly equipped, in good condition at the time of the fire, and managed by a competent and trustworthy engineer, and therefore completely overcame the presumption of negligence from the fact that defendant's engine caused the fire, as held by this court in *Kelsey v. Railway Co.* (S. D.), 43 Am. & Eng. R. Cas. 43. But in this

Evidence to
support finding
of negligence—
Other fires.

contention we think the counsel for appellant have not given sufficient consideration to the evidence on the part of the plaintiff in addition to the presumption of negligence caused by the fire. If the plaintiff had given no evidence of negligence, but relied solely on presumption, the counsel's contention would have undoubtedly been correct, as this court so held in the case of *Cronk v. Railway Co.* (S. D.), 54 Am. & Eng. R. Cas. 525, following the case of *Volkman v. Railway Co.*, 5 Dak. 69, 35 Am. & Eng. R. Cas. 204; *Pattee v. Railway Co.*, 5 Dak. 267, 34 Am. & Eng. R. Cas. 399; *Huber v. Same*, 6 Dak. 392, 40 Am. & Eng. R. Cas. 188. The evidence on the part of the plaintiff that the same engine set two other fires at about the same time, and within about one half mile of the first fire, was important as showing that the engine was not in a proper condition to prevent the emission of sparks. This evidence on the part of the plaintiff was not controverted, but it was sought, not only to rebut the presumption we have alluded to, but the evidence on the part of the plaintiff that the same engine set two other fires about the same time, by proof that the engine was properly equipped, in good condition, and operated by a competent and careful engineer. There was therefore conflicting evidence on the question of negligence, to be determined by a jury as a question of fact, and not one of law for the court.

The case of *Railroad Co. v. Hotham*, 22 Kan. 41, was a very similar case as to the one at bar. In that case the plaintiff was not aided by the presumption of negligence on the part of the defendant upon proof that the engine caused the fire, but the burden was upon the plaintiff in that state to prove the negligence of the defendant. This the plaintiff sought to do by proving that the engine that caused the fire also caused two other fires the same day. "The evidence showed, and the jury found, that the engine from which the sparks escaped which caused the fire was a first-class engine, in good order and good condition, and supplied with all the most approved appliances for preventing the escape of sparks of fire. The engineer who had charge of the engine at the time the fire was produced was also a careful, competent, and trustworthy engineer." (Opinion of the Court, p. 48). But the jury found, notwithstanding this proof, that the engine was mismanaged, and found for the plaintiff. In delivering the opinion of the court, Mr. Justice VALENTINE says: "The law does not attempt to define what particular facts or conduct shall constitute negligence or prove negligence. It, at most, can only say that negligence is the absence of care, and leaves the question for the jury to determine whether, under all the circumstances, due care has been exercised or

not. Of course, it is the province of the court to determine whether the evidence offered or introduced tends to prove or disprove negligence. And if no evidence is offered or introduced, tending to prove negligence, the court may itself decide that no negligence is proved, and direct the jury to find accordingly. And where evidence is introduced, proving negligence beyond all controversy, and no countervailing evidence is introduced, the court may generally say that the negligence is proved. * * * And, when, all the evidence offered is introduced, then, unless there is no evidence introduced to prove negligence, or unless the evidence introduced is all one way, and proves negligence beyond all controversy, the question whether negligence is proved or not is a question for the jury, and not a question of law for the court. In all cases where the facts constituting or tending to prove or disprove the negligence are disputed, the question whether such supposed negligence has any existence or not is a question of fact for the jury. And even where there is no dispute about the facts in their details, still, if they are stated or proved in such limitless, cumbrous, or diffusive detail that different minds of reasonable capacity might honestly differ with respect to whether they in fact constitute or prove negligence or not, the question as to whether they do in fact constitute or prove negligence or not must be submitted to the jury as a question of fact."

The case of *Railroad Co. v. McCahill*, 56 Ill. 28, is also instructive upon this question. In Illinois the statute made the fact that the fire was occasioned by the engine *prima facie* evidence of negligence on the part of the company, and of its agents and servants in charge at the time. In that case the plaintiff proved, in addition to the *prima facie* case made by the statute, that the engine on the day of the fire threw out an unusual amount of sparks. This evidence was held to be sufficient to warrant a jury in finding that the engine was not in a suitable condition to run at the time. In that case the court says: "In opposition to all the evidence offered by the company, there is the unimpeached testimony of witnesses that the engine, as it passed through the village on the day the fire occurred, threw out unusual quantities of fire, and that it did actually occasion the fire that consumed the property of appellee. Intelligent witnesses, and men of large experience, sworn on behalf of the company, concede the fact that, if it be true that the engine did emit such an unusual volume of fire as stated by the witnesses, it must necessarily have been out of repair at the time. Whether this engine was ever equipped with the best mechanical contrivances to prevent the emission of fire-sparks does not very clearly ap-

pear; but, if it be admitted that it was originally so constructed, the actual results of what the engine did, in throwing out and emitting fire-sparks as it passed along through the village on the day the fire occurred, are sufficient to overcome any direct evidence appearing in this record that it was in good order, or, if in good order, it must have been most unskillfully managed by the engineer. We are of opinion that the verdict is not against the weight of the evidence, and the jury were fully authorized to find as they did." See, also, *Huber v. Railway Co.*, 6 Dak. 392, 40 Am. & Eng. R. Cas. 188.

So, in the case at bar, this court cannot say, as a matter of law, that the jury was not fully justified in finding that the defendant was guilty of negligence in using an engine in such a condition or so equipped as to throw out sparks of fire of sufficient size to set three fires within the limits of about one half mile upon the line of defendant's railway, notwithstanding the positive testimony of defendant's witnesses as to the good condition of the engine; that it was equipped with the best known appliances for arresting sparks, and was at the time managed by a competent and trustworthy engineer. It was a question of fact for the jury.

3. It is further contended by the counsel for the appellant that the court erred in calling the jury's attention to the fact of the other two fires. We are unable to discover any error in this, as the question of whether or not the fact that the engine set two other fires about the same time constituted competent evidence tending to prove that the engine was in a bad condition, or was improperly equipped, was a question of law, and it was the duty of the court to charge the jury upon the subject. It may be that the court would have been justified in refusing to give the plaintiff's instructions upon the ground that it had instructed the jury upon the subject in his general charge, but that was a matter in the discretion of the court; and the fact that the court speaks of it in its general charge, and also gives a special instruction on the same subject, not inconsistent with his general charge, constitutes no ground of error.

4. The counsel for the appellant further contends the court erred in refusing to give the following instruction which the defendant requested the court to give: "If you should believe from the evidence in this case that the plaintiff's hay was destroyed by a fire negligently set out from, or started by, one of the defendant's engines, you would not be justified in returning a verdict for him, if you should find he had not properly guarded or cared for his hay, as against fire, and that by reason thereof the fire so set

Instruction
calling atten-
tion to other
fires.

Contributory
negligence.

or started destroyed the hay. Refused." It is contended by counsel for the appellant that as the plaintiff alleged in his complaint that he "was not guilty of any negligence which in any way contributed to the loss of the hay," and this allegation was denied by the general denial in the answer, it was therefore an issue in the case, and that the court erred, not only in omitting to call the jury's attention to this issue, but also in refusing to give the instruction asked for by the defendant, above set out. This presents the important question as to the party upon whom is imposed the burden of proof as to the contributory negligence, or absence of contributory negligence. Must the plaintiff prove that he was not chargeable with negligence contributory to the injury? Or must the defendant prove such contributory negligence on the part of the plaintiff as a defence to the action?

The courts of the several states are divided upon this question, some of the state courts holding that the burden of proving affirmatively that the plaintiff was not guilty of contributory negligence is upon the plaintiff, and others holding that the burden is upon the defendant to prove such contributory negligence. The Supreme Court of the United States holds with the latter courts. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Hough v. Railroad Co.*, 100 U. S. 213. We are of the opinion that the rule requiring the defendant to prove contributory negligence on the part of the plaintiff, unless the evidence of the plaintiff discloses such contributory negligence on his part is the better rule, and is supported by the greater weight of authority. The reasons advanced in support of the respective positions are clearly stated by the Supreme Court of Wisconsin, in *Hoyt v. City of Hudson*, 41 Wis. 105, and the conclusions reached by that court are thus stated: "It seems to us that the reasons in favor of the rule which casts the burden of proof in such cases upon the defendant are the stronger and better reasons, and that such rule rests upon sound legal principles, and ought to prevail in this state. We therefore hold that, in the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden was upon the defendant to prove such contributory fault, if the same was relied upon as a defence. The rule here adopted does not apply to a case in which the proofs on behalf of the plaintiff show, or tend to show, his contributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant. If the evidence only tends to show such contributory negligence, the question

must go to the jury, to be determined, like any other question of fact, upon a preponderance of evidence." This decision is important, as, to reach the conclusions announced by the court, it was necessary to overrule two prior decisions of that court. See, also, the able opinion of Judge DUEK, in *Johnson v. Railroad Co.*, 5 Duer, 21.

We have not deemed it necessary to cite the large number of cases reported on this question, as they are either cited by counsel for respondent, or are collected in *Shear. & R. Neg.* (4th ed.) in notes to sections 107-109. The late territorial court, in the early case of *Sanders v. Reister*, 1 Dak. 151, 46 N. W. Rep. 680, took a similar view of the law, following the rule laid down in *Railroad Co. v. Gladmon*. In delivering the opinion, Mr. Justice BENNETT says: "The decisions in the different states are very conflicting on this point, but so far as this court is concerned it is effectually set at rest by the case of *Railroad Co. v. Gladmon*, 15 Wall. 401. In that case Mr. Justice HUNT, in delivering the unanimous opinion of the court, says: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff." After a careful examination of all the authorities, the same rule is laid down as the better law by *Shearman & Redfield* (section 44), and by *Wharton* (section 423), and I deem it unnecessary to elaborate the point further." See, also, *Mares v. Railroad Co.*, 3 Dak. 336, 17 Am. & Eng. R. Cas. 620.

The allegation in plaintiff's complaint that the plaintiff "was not guilty of any neglect which in any way contributed to the loss" was surplusage, and its denial raised no material issue that plaintiff was required to prove. Unless, therefore, the evidence of the plaintiff tended to establish contributory negligence, or the defendant gave evidence tending to establish it, there was no issue upon that question to be submitted to the jury. An examination of the evidence discloses no such testimony. The evidence of the plaintiff tended to prove that his hay was stacked 60 rods or more away from the line of the railway, and that within a few minutes after the fire started near the right of way of the railway company, it reached his stacks of hay, and consumed them. The only proof on the subject by defendant was that there were no fire-guards around the hay. But there was no evidence to prove that fire-guards were usual or necessary, or that the hay was not protected in the usual manner in that section of

country. In the absence, therefore, of any evidence upon the subject, it would be the duty of the court to assume that the plaintiff was not guilty of contributory negligence. In the case in 22 Kan., *supra*, "the court charged the jury, among other things, that the plaintiff could not recover for any injury to his hay unless the jury were satisfied, by affirmative evidence, that the said plaintiff was in the exercise of ordinary care and caution on his part to prevent such injury." Mr. Justice VALENTINE, in delivering the opinion of the court, says: "Now, this instruction was entirely too favorable to the defendant, and was erroneous as against the plaintiff. In the absence of evidence tending to show either that the plaintiff was negligent or not negligent, the court should have instructed the jury to find, and the jury should have found, that he was not negligent;" citing *Railroad Co. v. Pointer*, 14 Kan. 38. In the case at bar the court instructed the jury that if they found a certain state of facts to exist they should find for the plaintiff, provided the plaintiff was not guilty of negligence in relation to said fire, and made reasonable efforts to put out the same, and save his property." We think this instruction was as favorable to the defendant as the facts in the case would justify, as there were apparently no facts requiring the question of contributory negligence to be submitted to the jury in the case.

We find no error in the record, and we are of the opinion the judgment of the court below should be affirmed, and it is so ordered; all the judges concurring.

Evidence to Rebut Presumption of Negligence in Causing Fire.—In *Nockstedler v. Dubuque & S. C. R. Co.* (Iowa, May 18, 1893.), 55 N. W. Rep. 74, it was held that in an action for fire it is for the jury to weigh the presumption of negligence in the balance against the evidence rebutting the presumption, and determine the case as they may think it should be determined. *Babcock v. Railway Co.*, 62 Iowa, 593, 11 Am. & Eng. R. Cas. 63, and 13 Am. & Eng. R. Cas. 477; *Id.*, 72 Iowa, 197. In this case there was evidence that the fire was set out about 75 feet from the railroad track, and outside the right of way. There was a strong wind blowing, and the train was made up of so many cars that it required the full capacity of the engine to draw it over the grades. The fire was set out just over the summit of a heavy grade, and when the engine was expending all its power. It further appeared that when an engine is working at its full capacity it is liable to set out fires. In view of all the evidence, the jury was authorized in finding that the engine was either defective, or that there was negligence in the manner in which it was operated.

Inference that Fire was Caused by Sparks.—In *Cincinnati, L. St. L. & C. R. Co. v. Smock* (Ind.), 33 N. E. Rep. 108, there was much evidence introduced on the trial tending to prove that on the occasion in question the engine threw an unusual quantity of sparks and coals of fire, and that such coals were of an unusual size. It was held that from this evidence the jury could rightfully infer that the fire occurred by reason of the negligence of the appellant. Citing *Railroad Co. v. Ostrander*, 116 Ind. 259, 32 Am. & Eng. R. Cas. 361.

McCoy

v.

SOUTHERN PACIFIC R. CO.

(94 California, 568.)

Killing Live-stock—Landowner Opening Fence—Rights of Licensee.—Where the lessees of land along a railroad track have made an opening in the railroad fence, which has been constructed by the railroad company as required by the statute, one who has a license to pasture sheep upon such land cannot recover the value of the sheep from the railroad company on whose track they have been killed after passing through the opening.

Same—Fences Open with Consent of Railroad Company.—If the opening in the said fence was made with the consent of the railroad company, under an understanding that the said company would substitute a gate for the panel removed, it would be the duty of the company to put up the gate within a reasonable time, and failure to do so would make it liable for the loss of the stock; but where such agreement was made with an agent of the company, it was the duty of the plaintiff to show that the person assuming the act for the company had authority to do so.

IN bank. Appeal from Tehama superior court.

Chipman & Garter (S. C. Denson, of counsel), for appellant.

John F. Ellison and *A. M. McCoy*, for respondent.

DE HAVEN, J.—The complaint alleges that plaintiff's sheep were lawfully grazing in a certain field through which the road of defendant runs, and that, by reason of the failure of defendant to construct and maintain a good and sufficient fence along the line of its road at that point, the sheep strayed upon defendant's road and were killed by the passing cars. This action is to recover damages for the loss of such sheep. The plaintiff recovered judgment in the superior court, and the defendant appeals. The evidence upon the trial tended to show that the land from which the sheep strayed was at the time in the possession of Boyd Bros., as lessees for a term of years, and that plaintiff's sheep were being pastured there under an agreement with the Boyd Bros. by which the plaintiff bought the stubble and feed standing in the field, with the privilege of herding or keeping his sheep on the stubble until it should be "fed off" by the sheep. In substance, the contract was for pasturage, the plaintiff undertaking to herd and look out for his sheep while they were on the land. The defendant constructed a suffi-

cient fence along that portion of its road passing through the field in question, but prior to the time plaintiff obtained the right to thus pasture his sheep in the field, the Boyd Bros., for their own convenience in driving in and out of the field, made and left an opening in the fence by removing a panel therefrom, and the fence was in this condition when plaintiff's sheep were put in the field, and the Boyd Bros. continued thereafter to drive through this open gap with their teams as they had done before, and it was through the breach thus made in the fence by the Boyd Bros. that plaintiff's sheep strayed upon the track of defendant. Upon the trial it was claimed by plaintiff that the Boyd Bros. took the panel out with the consent of defendant, and that the defendant agreed to replace the same with a gate, while, upon the other hand, the defendant insists that it gave no such consent, and made no such agreement.

1. Section 485 of the Civil Code provides: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owners of the animals so killed or maimed." The defendant complied with this statutory duty, so far as concerns the Boyd Bros., when it constructed the fence along the line of the road passing through the land occupied by them, and if, thereafter, they removed a panel from such fence for their own convenience, they would not be heard to complain if their own stock had strayed through the opening thus made onto the track of defendant and been injured. In such a case the loss would be attributed to their own fault, and the defendant would be exonerated from liability therefor by the very terms of the statute just quoted. We do not think that plaintiff occupies any more favorable position. The right which he had to pasture his sheep in the field from which they strayed was nothing more than a license, and its license did not confer upon him any rights as against the defendant which his licensors themselves did not possess. The question whether a subsequent grantee or lessee of this land could recover from defendant, if by reason of its failure to repair this fence the stock of such grantee or lessee should be injured by the cars of defendant, does not arise in this case. The Boyd Bros. were at all times in the possession, occupation, and rightful

Liability of
railroad where
farmer opens
fence.

control of the field from which plaintiff's sheep escaped, as lessees, and as such continued to use the opening which they had made in this fence, and they could not, by giving plaintiff permission to turn his sheep into such field, impose upon defendant any new duty with respect to this fence, or expose it to liability for damages, such as here claimed, by one who is in privity with them. As the plaintiff here was there with his sheep only by their license, he must be deemed to stand in the place of the Boyds, and possessed only of such rights as they could have enforced against defendant if they, instead of plaintiff, had owned the sheep killed on defendant's track.

2. The court did not err in refusing the instructions requested by defendant. The sixth instruction, as requested was indefinite, and, if given, would have laid down no rule for the jury to observe, and the third does not correctly state the law which would be applicable to the case if it were shown that the Boyd Bros. removed the panel with the consent of the defendant, and upon its agreement to replace it with a gate. In such a case it would be the duty of the defendant to put up the gate within a reasonable time, and if it failed to do so it would be liable for any loss of stock occasioned by such neglect, precisely as if it had left the opening without the consent of the adjoining owner when it constructed the fence. As the case is to be remanded for a new trial, it is proper to say that, in order to prove that defendant agreed to put in a gate, it must be shown that the person assuming to act for it had authority, either actual or ostensible, to act for it in the matter, or that his agreement was subsequently ratified by defendant. The third instruction given by the court, at the request of plaintiff, when read, as it must be, with reference to the evidence in the case, is in conflict with the law as declared in this opinion, and in giving it the court committed error. The other points made do not require special mention.

Fence opened
with consent
of railroad
company.

Judgment and order reversed.

We concur: PATERSON, J.; SHARPSTEIN, J.

McFARLAND, J.—I concur in the judgment of reversal and in the opinion of DE HAVEN, J., with this exception: I think that the sixth instruction asked by defendant should have been given. It told the jury, substantially, that plaintiff had no greater rights than the Boyds would have had if their sheep had escaped through the opening in the fence and been killed. Of course, the jury should have been further instructed what, in the event supposed, the Boyds' rights would have been; but the instruction, as far as it went, was, in my opinion, correct. Whether or not the statute was intended

for the protection of the public generally is a question which does not arise in this case. If a passenger were suing for damages from an accident caused by animals on the track, then such question would be presented. "Through or along the property of the owner thereof" certainly does not include a person who has a mere temporary license to have his stock eat stubble when his licensor maintains the opening. If so, then it would include the horses of a guest turned out for a day or two to graze. The Boyds were the owners of the property within the meaning of the statute. If the doctrine of the judgment of the lower court were to prevail, then a railroad company could never with safety give to any adjoining landowner the accommodation that was given to the Boyds.

BEATTY, C.J.—I concur in the judgment and in the opinion of DE HAVEN, J. The superior court did not err in refusing to give the instructions asked by the defendant in the form in which they were put, for they did not state clearly or accurately the proposition of law upon which the defence rests, but certainly it was error to give the third instruction requested by plaintiff unqualified by any statement of the proposition that the plaintiff, if a mere licensee of Boyd Bros., could not recover for his loss if they made and maintained the opening in the fence for their own convenience. The evidence in the case very clearly shows that the defendant had fully performed its duty by the erection of a sufficient fence, and that Boyd Bros subsequently removed a panel for their own convenience. To counteract the effect of this proof an attempt was made to show that defendant had agreed to close the gap by putting in a gate. But, in my opinion, there was no evidence to justify a finding that the defendant ever made any such agreement. There was evidence that Daly, a section-boss, promised to put in a gate, but no evidence that he had any authority to make such agreement in behalf of the defendant. No actual authority was shown, nor any circumstance from which an actual authority can be inferred, and his ostensible authority to bind the defendant did not extend to a matter as to which the obligation rested exclusively upon Boyd Bros., and in no degree upon the defendant.

Killing Live Stock—Contributory Negligence of Owner—Animal Escaping from Owner's Premises.—In *Nelson v. Great Northern R. Co.* (Minn., Jan. 16, 1893.), 53 N. W. Rep. 1129, it was held, in an action against a railroad company for the value of a horse killed by the defendant's train, that a horse accidentally escaping from the owner's premises without his fault is not to be deemed to be unlawfully running at large while proper efforts are being made to retake it; and the plaintiff was not chargeable with contributory negligence by reason of the escaping of the horse.

In *Ohio & M. R. Co. v. Craycraft* (Ind., Oct. 25, 1892.), 32 N. E. Rep. 297, it was held, in an action against a railroad company for injury to stock, that the plaintiff could not, as a matter of law, be held guilty of contributory negligence for the reason that he permitted his animal to run at large in the immediate vicinity of the place where it was killed, the evidence showing that the animal was not there with the plaintiff's consent, but had escaped from the stable; and the plaintiff could recover in such a case where his animal, while wandering at large, was killed through the negligence of the railroad company.

Cattle in Owner's Pasture.—In *Birmingham Mineral R. Co. v. Harris*, (Ala. June 17, 1893.), 13 So. Rep. 377, it was held that it was not negligence to allow cattle to run into the owner's pasture, although the defendant's road ran through it.

Driving Cattle over Highway Crossing.—In *Tuthill v. Northern Pacific R. Co.* (Minn., June 1, 1892.), 52 N. W. Rep. 384, it was held that the mere fact that a person on horseback, engaged in driving cattle along a highway toward a railway crossing, did not ride forward as the cattle approached the same and look for coming trains, is not conclusive evidence of negligence on the part of such person.

Negligently Turning Animals Loose.—In *Peterson v. Wisconsin Central R. Co.* (Wis., Oct. 17, 1893.), 56 N. W. Rep. 639, it was held, that the plaintiff was guilty of contributory negligence such as to prevent recovery, where, in an action for the killing of horses which had strayed upon a railroad track, it appeared that he allowed his horses to be turned loose in a yard, knowing that the fence between the yard and the railroad track was down for several rods, although he had ordered his men to watch them, which they failed to do.

Horse Following Owner on Highway.—In *Toledo, St. L. & K. C. R. Co. v. Jackson* (Ind., Dec. 15, 1892.), 32 N. E. Rep. 793, it was held that, where the plaintiff had permitted his horse to follow him across the defendant's right of way, and a safe distance beyond the track, whence it had returned to the railroad track, because frightened by the approach of the train, at a point which the defendant had failed to fence, that such act of the plaintiff was not an abandonment of the horse which would prevent a recovery.

Complaint Based on Failure to Fence—Contributory Negligence not in Issue.—In *Chicago & E. R. Co. v. Brannegan* (Ind., Dec. 13, 1892.), 32 N. E. Rep. 790, it was held, under a statute making companies absolutely liable for stock killed or injured by their trains, unless the railroads were securely fenced, that a complaint which alleged that the right of way was not securely fenced at the point where the animal entered on the track and was killed was sufficient, without any allegation as to the duty of the company to fence the road; and the action being based on defendant's failure to fence its track, the question of contributory negligence could not arise.

Presumption against Railroad Company Overcome by Proving Contributory Negligence.—In *Georgia Railroad & Banking Co. v. Park* (Ga., Nov. 4, 1892.), 16 S. E. Rep. 266, it was held that the presumption of negligence which the law casts upon a railroad company, when the injury to person or property has been proved, was fully met and overcome by the evidence for the railroad company in this case, which showed that its servants exercised all reasonable care and diligence at the time of the injury; that there was ample time for plaintiff's servant in charge of the mule to have found the bridge watchman and given him notice that the mule was fast in the trestle. *Held*, that the failure to do this was the real cause of the subsequent disaster, and that the court erred in not granting a new trial.

HODGINS

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE R. CO.

(N. Dak. Supreme Court, July 7, 1898.)

Negligence in Killing Stock—Presumption of Negligence—Rebuttal by Defendant.—Where an action is brought against a railroad company for the negligent killing of a domestic animal, the plaintiff can, if he sees fit to do so, make out a *prima facie* case without showing actual negligence, by proving the value of the animal and the fact that it was killed by defendant's train of cars; but in such case, if the defendant, to overcome the statutory presumption of negligence arising from the killing, shows conclusively by undisputed evidence that the train in question was at the time of the accident in good repair and condition, and was equipped with the best modern appliances and improvements in use, and was operated skillfully and with due care, then and in such case, the statutory presumption of negligence arising from the killing is rebutted and entirely overcome; and where, in such case, at the close of the testimony, defendant requested the trial court to direct a verdict for the defendant, and the court refused to do so, such refusal was reversible error.

APPEAL from Dickey district court.

L. W. Gammons (*Alfred H. Bright*, of counsel), for appellant.
W. H. Rowe and James M. Austin for respondent.

WALLIN, J.—This action is brought to recover damages for the killing of plaintiff's horse. The horse was killed in the evening, at about 8.45 o'clock, on May 24, 1890, by being run over by defendant's locomotive. The accident occurred on a bridge at a crossing of the Maple River, a short distance east of Boynton station, in Dickey county. When struck by the locomotive, the hind legs of the horse had slipped through the ties of the bridge, so that the animal could not extricate them, and the horse was partly on the railroad track and partly off the track and on the bridge. The animal's head was facing the west, and the locomotive and train were going east. The train, besides the locomotive and tender, consisted of two coaches, viz., a passenger car and a sleeper. Plaintiff, without proving actual negligence, made out a *prima facie* case, under the statute, by showing the killing of the horse by being run over by the defendant's locomotive and the value of the animal. To rebut the presumption of negligence raised by the statute from the mere fact of killing, the defendant introduced as witnesses the men who

had charge of the train in question, viz., the engineer, fireman, and conductor.

The engineer testified, in substance, that he had been an engineer nine years, and in defendant's employ six years, and that there were no dismerit marks against him as an engineer; that the train in question was a special train drawn by a locomotive then newly-repaired, and in good condition, and was equipped with all the appliances in use at the time and all the modern improvements, and that there were air-brakes on the engine, tender, and coaches. After leaving the station, at 8.35 P.M., the train ran for some miles at the rate of about twenty miles an hour until it came upon a rough piece of road, and, while running over that, the rate was about fifteen miles an hour, to a point on the road distant about one half mile from the bridge in question, and from there the speed was quickened to about twenty miles an hour, until the horse was seen by the engineer and fireman. "Question. How about the lookout? Answer. I had my lookout all the time. Just before I got to the rough place, I got to the window, and was looking out of the window. Q. Go on now, and state further. A. When we got down very near the bridge, I saw an object, right side, as I supposed was the number-board. As I got very near to it, it moved. By the court: You supposed it was what? A. I supposed it was the number-plate of the bridge. It was a white plate with figures on it. White board, about that wide. * * * A. As I got very near the bridge, I saw the object move, and I discovered it was a horse; raised his head up, and threw one leg over the rail. Q. Where was he lying? A. He was lying between the guard-rail of the bridge and the rail on which the engine runs, outside of the track. Just as he made a lunge, he threw one leg over the rail, which cut off one hoof. He threw his head out, and the engine trucks and pilot pushed him along. Q. When you saw this motion, what did you do? A. Did all possible to stop. Q. What was that? A. Put the air on, and made a — to stop. I reversed my engine on sand, putting her on the back motion; made what is called an 'emergency stop.' Q. What effect would that have on the brakes and wheels? A. It would have a great —. Q. Would it stop the wheels? A. It would stop the wheels. It would help to stop the train speed. The motion of the wheels going ahead, the reverse of the engine would have the effect to drive the wheels opposite to the head-motion. Q. And it would have a tendency to shove the train back? A. Yes, sir. Q. After you saw this horse, was there anything else you could have done to have stopped this train? A. No, sir. Q. You made what you call an 'emergency stop'? A. Yes, sir. Q. I will ask you, until

you saw the horse raise his head, and throw its leg over the rail, was the track clear? A. The track was clear? Q. Clear across the bridge? A. Yes, sir. Q. Now, if I understand you, you mean that no part of the horse's body—that no part of the horse was lying between the rails. A. No, sir. Q. How far is the outer-rail from the guard-rail, as you call it? A. The guard-rail is put on the outside of the bridge-tie, so as to hold them from slipping endways. It is a wooden guard rail. Q. How far from the rail? A. I think it is calculated to be three feet. Q. When you saw this horse, what did you see in the way of danger to yourself that it amounted to? A. I knew right off that there was great danger there. If the horse had been between the rails, I should have been almost tempted to jump off. Q. And you say that the train and the people on it were in danger of their lives? A. Yes, sir. Q. What was the color of the horse? A. White. Q. What was the color of the number-board? A. White. Q. What was the fireman doing? A. Keeping a lookout. Q. Do you know when he recognized this object? A. At the same that I did. He had just about half the words out of his mouth, saying 'Ho,' when I saw it. Q. How many feet were you from the horse when you applied the brakes? A. I should judge between six and seven hundred feet. I would say between six and seven rods. Q. Or how many feet? A. About 114-15 feet. Q. State whether or not this is a long or short distance to stop a train in of that kind? A. A short distance to stop a train of that kind. Q. About what rate were you running at the time you saw the horse? A. Twenty miles an hour. Q. About what rate when you struck? A. About five. Q. You stopped, did you? A. Yes, sir. Q. Was there any one there when you stopped? A. No one there when I stopped." The witness further testified that the train reached the bridge about 8.45 P.M., and that it was dusk, but not dark, at the time; that the lights on the train were lighted at the last station, Boynton, some three miles distant; and that the head-light is not much of a light until darkness comes. "Q. At that time of day, how far could you see along the track? A. Not over one hundred and fifty feet. Q. Could you stop a train of three coaches with the latest improved air-brakes in going the length of the train? A. Yes, sir.

The testimony of the conductor, so far as it bears on the points made in the assignments of error, corroborates that of the engineer, but the appellant claims that there is a material conflict in the testimony of the fireman and engineer as to where the train was with reference to the position of the horse when the horse was discovered by the engineer and fireman. It will be necessary to consider this feature of the

fireman's testimony, which is as follows: "Question. Where were you, and what were you doing, on the evening of May 24 or 25, 1890, the time of this accident? Answer. I was firing with Mr. Furtney [the engineer] on a special." Speaking of a point about a half-mile from the bridge, the witness was asked: "Q. From this time on until the engine struck the horse, what were you doing? A. Sitting on the seat. Q. Where was that? A. Left-hand side of the engine. Q. What were you doing? A. Looking out of the window. Q. Were you constantly looking along the track? A. Yes, sir. Q. How far was this from the bridge? A. About a half-mile. Q. During that time, did you have to put any fire in the fire-box? A. No, sir. Q. When did you first discover the horse? A. When he raised his head. Q. Up to that time was the track itself clear? A. Yes, sir. Q. Well, what was done by the engineer? A. He blew the brake-alarm, and reversed his engine, and gave her sand." The witness fully corroborated the engineer as to the appliances on the train and the good condition of the engine. He then testified as follows: "Q. About how far do you think you were from the horse when these brakes were put on? A. I should judge about five or six hundred feet—somewhere along there. Q. Now, in stating the distance the train was from the horse, when I asked this question, I have reference to the distance that your locomotive was west of the horse when the brakes were applied. How far was that? A. I couldn't just tell. Q. How far do you think? A. Somewhere along between five and four hundred feet. That is what I thought it was. Q. How many times the length of the train do you think it was? A. It was not over the length of the train. Q. Is that train nearly four hundred and fifty feet long? A. I do not think I understand the question. Q. I want to know how far it was from where the engine was, when the brakes were put on the engine, to the horse at the time. I asked you how many lengths of the train. A. It was not the length of the train. About the length of two coaches is what it was. By the court: Q. How long is a coach? How many feet is a coach? Is it 200 feet long? A. I do not believe they are. Q. How many feet do you think the engine was from the horse when the brakes were applied? I couldn't say. Q. Of course, you didn't measure it. Give an estimate. A. Well, I did. Q. About four hundred feet? A. About four hundred feet. Q. Daylight or dusk? A. Dusk—quite dusk. Q. Which one saw the horse first? A. That I couldn't say. Both saw it about the same time. I hadn't the words out of my mouth when he put the brakes on." The testimony showed that the grade approaching the bridge was 30 or 35

feet to the mile; also that a passenger coach is sixty feet in length. As to the stop, the conductor testified: "It was a very quick stop; almost threw me off my feet. When they applied the brakes first, I fell forward, and it almost threw me off my balance."

A motion was made at the close of the case to direct a verdict for the defendant, which was denied, and in this court the ruling is assigned as error. We think the ruling was error. There was but a single point arising on the evidence. The court charged the jury as follows: "Now, gentlemen there is just one question to determine in this case: Did those in charge of that train use ordinary care to prevent the injury after they had discovered the horse? They had no right to anticipate, or, rather, there was no obligation upon them to anticipate, that a horse or a person or anything else was upon the track. But, when they observe that a person or an animal is upon the track, it is their duty to exercise reasonable care to prevent injury to the horse or person, as the case may be." The charge was entirely correct, and laid down the well-established rule and the rule applied by this court in *Bostwick v. Railroad Co.*, 2 N. Dak. 440, 49 Am. & Eng. R. Cas. 527. But we think the case, as presented by the testimony, is one in which there was a complete failure of proof upon the vital point of negligence, and consequently a case where the responsibility of making a decisive ruling belonged to the court, and should not have been devolved upon the jury. In making out a *prima facie* case, no testimony tending to show negligence was introduced by the plaintiff. The fact of the killing, however, made out a case of legal or constructive negligence under the statute, which declares: "The killing or damaging of any horse, cattle, or other stock by the cars or locomotive along said railroad or branches, shall be *prima facie* evidence of carelessness and negligence of said corporation." Comp. Laws, § 5501. But this court held in the case of *Smith v. Railroad Co.*, 53 N. W. Rep. 173, that negligence which is constructive and legal, as contradistinguished from actual negligence, may be overcome by proof of the exercise of due care on the part of the railway company, and that whether or not such constructive negligence has been overcome by testimony is always a question of law for the court, and not a question to submit to a jury. The defendant offered testimony to rebut and overcome the technical case of presumptive or legal negligence which the statute creates for plaintiff's benefit. In our opinion, the testimony was ample for this purpose, and went further, and demonstrated that the defendant was guilty of no negligence whatever in the

Improper refusal to non-suit plaintiff.

premises. The testimony of the engineer, conductor, and fireman is not contradicted as to any material fact having reference to the degree of care used by the engineer and fireman in keeping a lookout, or in their strenuous efforts to avoid a collision after the peril to the horse and the train were discovered. Counsel for the respondent points to the discrepancy in the testimony of the fireman as to the distance of the horse from the engine at the time the air-brakes were applied to stop the train. True, the fireman's ideas of distance between the engine and horse at that time, when expressed in feet, were confusing, and apparently conflicting with the engineer's testimony upon the point. But it is clear that the conflict was apparent and not real. The fireman said and reiterated, in substance, that the horse was not the length of the train away from the engine when the brakes were applied, and that the distance was about the length of two coaches. In this he agreed substantially with the engineer, and, as we have said, there is no evidence in the case tending to show that the distance was either greater or less than that testified to by both the trainmen. Negligence is a fact; and where, as in this case, it constitutes the gist of the action, it must be made out affirmatively by the plaintiff.

In the case at bar we find no proof whatever of actual negligence, and hence we are of the opinion that the court erred in refusing to direct a verdict for the defendant. A new trial will be directed. All concur.

Burden of Proving that Railroad Train Killed Animals—Sufficiency of Evidence.—In *St. Louis & S. F. R. Co. v. Sageley*, 56 Ark. 549, it was held that the mere fact that a horse was found dead near the defendant's railroad track raised no legal presumption that the killing was done by the defendant's train, no matter what probabilities might arise, it being incumbent on the plaintiff to prove by a preponderance of the evidence that the horse was killed on the track; and it was not proper for the court to tell the jury what weight should be attached to a probability arising from any circumstance or set of circumstances, unless it was satisfied upon all the evidence that such probability fairly preponderated against counter-probabilities. In this case the court said: "It was incumbent on the plaintiff to prove by a preponderance of the evidence that the horse was killed on the track, and he could not satisfy this requirement by proof of a fact from which it seemed probable, and then appeal to a legal presumption to overcome other or stronger probabilities. If, upon all the evidence, the jury believed that the horse was killed on the track, then, under the rule fixed by statute, the presumption would arise that it was killed by a train, and that it was due to the defendant's negligence; but in a case where a dead animal is found near a railroad track there is no statute that raises the presumption that it was killed at all, or, if killed, that it was killed on the track, or by the train. On the contrary, it has been ruled by this court that there must be evidence to connect the injury with the running of the train. *Railway Co. v. Hagan*, 42 Ark. 126, 19 Am. & Eng. R. Cas. 446."

In *King v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 3, 1898.), 54 N. W. Rep. 204, it was held, in an action against a railroad company for the killing of a cow, that the evidence justified a finding that the cow was killed on the right of way, where it appeared that the cow's body was found upon the company's right of way from four to eight feet beyond a fence along a highway which crossed the track, the bottom part of which fence had been freshly broken, though the engineer testified that his engine struck the cow while she was on the highway and knocked her through the fence, where there were no signs of hair or blood on the fence and no marks of injury on the cow, and there were cow-tracks near the spot where the body of the cow was found; the evidence showing also that the fence along the railroad's right of way had been defective for some time.

In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 80 Fla. 557, it was held that testimony showing that plaintiff's cow was killed, and found, with her back broken, on the side of a railroad track, at a point where there was a ditch filled with water on either side, and a measurement of the cow's tracks indicated that she had run ahead of the train, and also there were indications where she had been struck by the train, was sufficient to sustain the finding of a referee that the train killed the cow.

In *Richmond & D. R. Co. v. Chandler* (Miss., April 8, 1898.), 18 S. Rep. 267, it was held that it was error to instruct the jury that, if the evidence showed that a bull which was killed by the defendant's train was worth \$300, they must find for the plaintiff, because such an instruction would require the defendant to pay for the animal without regard to its agency in causing its death.

Proof that Animal was Killed on Right of Way.—In *Daugherty v. Chicago, M. & St. P. R. Co.* (Iowa, Jan. 5, 1898.), 54 N. W. Rep. 219, it was held, in an action against a railroad company for killing a colt, that the evidence justified a finding that the colt was killed on the right of way and not on the crossing, where it appeared that the body was found on the right of way near a highway crossing; that there was a gap in the fence through which it could have gone upon the right of way, although there were hoof-prints on the highway and none on the railroad land, it being shown that the character of the land along the railroad track was such that hoof-prints would not be made in it, and that those in the road might have been made by other animals.

Prima Facie Responsibility for Damage to Stock.—In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 80 Fla. 557, it was held that the act of 1887 (chapter 3740, Laws Fla.), making the killing of live-stock by a railroad company *prima facie* evidence of negligence, operates upon the remedy, and does not change the basis of liability in such cases.

In *Louisville, N. O. & T. R. Co. v. Phillips* (Miss., April 8, 1898.), 12 So. Rep. 825, it was held, in an action for the killing of an animal which had gone upon a railroad track for salt which the railroad company had placed there, that the railroad company was not *prima facie* responsible for the damage, where it was shown that the salt was used to melt away the snow and ice from the tracks and switches, and that salt was the usual solvent used for that purpose.

In *Louisville & N. R. Co. v. Posey* (Ala., June 27, 1892.), 11 So. Rep. 428, under the provisions of the Code, that "a railroad company is liable for all damages done to stock * * * resulting from a failure to comply with the requirements" of the Code that the engineer of a locomotive must, upon perceiving cattle on the track, "use all means within his power, known to skilful engineers, such as applying brakes and reversing engine, in order to stop the train," and, also, for any negligence on the part of such company or its agents; and that, when any stock is killed or injured by the

trains of any railroad, the burden of proof in any suit therefor is on the railroad company to show that the requirements of the Code in respect to the duty of the engineer have been complied with,—it was held that the statute should be construed to mean that the burden is on the railroad company to acquit itself of negligence, and unless the burden is lifted the plaintiff is entitled to a verdict.

In *St. Louis, I. M. & S. R. Co. v. Taylor* (Ark., Jan. 7, 1893.), 20 S. W. Rep. 1083, it was held, under the statute providing that railroads operated in the state shall be responsible for all damages done or caused by the running of their trains, that the burden of proof was on the company to show that it was exercising due care when injury or damages were caused to the plaintiff; and the fact that the injury occurred while the plaintiff was using the right of way between the main and side-tracks of the company by its invitation was *prima facie* evidence of the company's negligence; held, further, that, where the testimony was conflicting, a verdict of the jury that the plaintiff was not guilty of contributory negligence, and that the company did not exercise due care, was conclusive as to the facts found.

In *Little Rock & M. R. Co. v. Chriscoe* (Ark., Jan. 21, 1893.), 21 S. W. Rep. 431, under the statute providing that "all railroads operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state"; it was held, in an action for the killing of a cow, that, the burden being on the defendant to prove due care, and the proof showing that negligence could be charged against the company by the failure of the engineer or fireman to see the cow in time to prevent its destruction, the company could not lift the burden by proving that the engineer had taken due precautions.

In *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, it was held that a verdict for the plaintiff must stand, where, in an action against a railroad company for killing a horse, the evidence showed that where the accident occurred the track was level and straight, so that a person at that point could see an animal on or near the track for half a mile in either direction, and hoof-prints showed that the horse had run in front of the engine two hundred yards before being struck; and that under such facts the burden was on the company to show any special circumstances which would have rendered it unsafe and impracticable to stop the train within a distance of two hundred yards.

In *Eddy v. Lafayette*, 49 Fed. Rep. 798, it was held that, in the absence of a statutory rule to that effect, the law does not presume negligence from the fact alone that an animal was injured or killed by the railroad company. In this case the court said: "The general, but not quite uniform, doctrine of the authorities, in the absence of a statute, is that the plaintiff must show that the railroad company was negligent, and that the law will not presume, and the jury is not authorized to infer, negligence from the fact of killing alone. *Volkman v. Railway Co.* (Dak.), 37 N. W. Rep. 731; *Eaton v. Navigation Co.*, 19 Oreg. 391, 43 Am. & Eng. R. Cas. 57; 1 Redf. R. R., § 126; *Pierce*, R. R. 428; 3 Wood, Ry. Law, § 417; 11 Ror. R. R. 1389; 1 Thomp. Neg., p. 512, § 15; 2 Shear. & R. Neg., § 419; *Deer Neg.*, § 298; *Whart. Neg.*, § 899; *Railway Co. v. Wendt*, 12 Neb. 76, 6 Am. & Eng. R. Cas. 584; *Milburn v. Railway Co.*, 86 Mo. 104, 29 Am. & Eng. R. Cas. 244; *Railway Co. v. Geiger*, 21 Fla., 669; *Railway Co. v. Bolson*, 36 Kan. 584, 35 Am. & Eng. R. Cas. 144; *Walsh v. Railroad Co.*, 8 Nev. 111; *Railway Co. v. Betts*, 10 Colo. 431, 31 Am. & Eng. R. Cas. 563; *Railway Co. v. Heiskell*, 13 Amer. & Eng. R. Cas. 555; *Railroad Co. v. McMillan*, 37 Ohio St. 554, 7 Am. & Eng. R. Cas. 588; *Railway Co. v. Henderson*, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559."

In *Birmingham Mineral R. Co. v. Harris* (Ala., June 7, 1893.), 13 So.

Rep. 377, it was held that the plaintiff made out a *prima facie* case of negligence against a railroad company, where he testified that he turned several animals into his pasture traversed by the defendant's road, that the next day he found several of them killed on each side of the track, and two crippled, that the track was straight where the animals were killed, and that a curve some six hundred feet from such place did not prevent one from looking along the track.

In *Jacksonville v. T. & K. W. R. R. Co.*, 30 Fla. 567, it was held that, under the act of 1887 (chapter 3740, Laws Fla.), the killing of live-stock by a railway engine, cars, or train is *prima facie* evidence of negligence on the part of the company operating the engine or train; and where the testimony shows that live-stock was killed by a train of cars on a railroad, and there is nothing in the evidence to relieve the killing from the statutory presumption that it was negligently done, it is sufficient to sustain a judgment against the company.

Common-law Rule in Indian Territory.—In *Eddy v. Lafayette*, 49 Fed. Rep. 798, it was held that the statute of Arkansas which was construed to have changed the common-law rule, placing on the plaintiff the *onus* of proving the railroad company negligent, by providing that, where the killing of stock has been confessed or shown, the presumption is that it was done by the train, and that it resulted from want of care, was not put in force in the Indian Territory by the act of Congress of May 2, 1890.

WADSWORTH

v.

UNION PACIFIC R. Co.

(18 *Colorado*, 600.)

Action for Killing Stock — Dismissal of Suit — Implied Agreement of Parties.—Where the court announced that a new trial should be allowed, and plaintiff then declared that he elected to stand by his case as made, and thereupon the court dismissed the action, *held*, that the circumstances showed that all parties intended to treat the case as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury."

Rights of Parties—Substance of Judicial Pleadings Must be Regarded.—The Code of Civil Procedure contemplates that the substance, and not the mere form, of judicial proceedings shall be regarded in determining the rights of parties.

Conflicting Evidence — Province of Jury.—Where the evidence is conflicting, or of such a character that different conclusions may be reasonably drawn therefrom, the case presents a question of fact for the jury under proper instructions.

Grounds for Dismissal of Action.—Though the dismissal of an action may not be warranted on the ground stated in the judgment order, yet, if the record discloses other grounds which, as a matter of law, show that plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld.

Action to Enforce against Railroad Company Duty of Fencing Track—Necessary Allegations.—Under the stock-killing act, as amended in 1885, before a person could claim that a railway company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway; that he had requested the railway company to fence its line, put in cattle-guards and gateways; and, moreover, according to said act, the railway company could not, by complying with such request, exempt itself from the unconditional liability otherwise imposed, except as against the party making the request.

"Judicial Decision"—Scope of Term.—It is not every remark in a judicial opinion that amounts to a judicial decision. General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

What Legislative Acts will be Enforced.—A legislative act, within the sphere of legislative power, and not an encroachment upon the province of some other department of the government, will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured.

Constitutionality of Stock-killing Statute.—By the stock-killing statute of 1885 (sections 13, 14), a railway company might be denied "the equal protection of the laws," and deprived of its property "without due process of law." Such a statute is unconstitutional.

Rules for Construing Statutes.—Where the sections of a statute must be construed together as dependent and not as independent provisions, the validity of one part invalidates other parts.

ERROR to Park district court.

This action was founded upon chapter 93, Gen. St. 1883, as amended by the act of 1885. Section 13 and amended sections 14 and 15 are as follows:

"Section 13. That every railroad or railway corporation or company operating any line of railroad or railway or any branch thereof within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof.

"Section 14. If the owner of any animal or animals so killed, or his or her authorized agent, shall make affidavit before some officer authorized to administer oaths that he or she was the owner or authorized agent of the owner, of the recorded brand found upon the animal or animals so killed or damaged at the time of such killing or damaging, and such persons shall, within 6 months after such killing or damaging, deliver such affidavit to the agent or any officer of such company or corporation, together with a certificate of his or her mark or brand, under official seal of any officer authorized by

law to record such mark or brands, or shall make affidavit that the animal killed or damaged, as aforesaid, had no recorded mark or brand, and that he or she is the owner of such animal, describing it, and the corporation or company shall pay to such person delivering such affidavit and certificate, or such affidavit last aforesaid, as follows: Schedule. For American sheep, each, two dollars and fifty cents (\$2.50); for Mexican sheep and goats, one dollar and fifty cents (\$1.50); for Texas cattle, yearlings, twelve dollars (\$12.00); for Texas cattle, two years old, seventeen dollars (\$17.00); for Texas cattle, three years old, steers and cows, twenty dollars (\$20.00); for Texas cattle, four years old steers or over, twenty-five dollars (\$25.00); for American yearlings, fifteen dollars (\$15.00); for American, two years old, twenty dollars (\$20.00); for American, three years old, steers and cows of all ages, twenty-eight dollars (\$28.00); for American, four years old steers and over, thirty-four dollars (\$34.00); for calves, ten dollars (\$10.00). The above price, when paid, shall be payment in full. All Texas and Mexican cattle shall be considered as Texas cattle, and half-bloods shall be classed as American cattle. Thoroughbred cattle, milch cows, high-grade American cattle and grade bulls shall be paid for at their cash value. Thoroughbred sheep shall be paid for at their cash value; horses, mules, and asses shall be paid for at their cash value; provided, that no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged, except as hereinafter provided. In all cases where such railroad company or corporation shall kill any of the stock mentioned in this act, and for which no price or sum is fixed, the owner or agent of such stock shall, after the filing, as aforesaid, of an affidavit and certificate of brand or affidavit of ownership, which affidavit shall contain a statement of class, grade, and value of such animal or animals, select some disinterested freeholder of the county where such killing took place, and shall notify such company or corporation of said selection, and such company or corporation shall, within three days thereafter, select some suitable person to act with person so selected, and the two so selected shall select a third, and the three so selected shall, without delay, proceed to appraise the value of the stock so killed or damaged, a majority of which three appraisers shall be sufficient to determine the same; and shall certify, under oath, such appraisement to an agent or superintendent of such company or corporation. In case such railroad or corporation shall refuse or neglect to appoint such appraiser, it shall be the duty of the justice of the peace nearest to the place where such stock was so killed or damaged to select three disinter-

ested persons as appraisers, and administer to them an oath to honestly appraise the value of such stock, which appraisers shall, without delay, appraise and forward to such justice the result of such appraisal, which justice shall, within ten days thereafter, forward to an agent or superintendent of such railroad or corporation, a certificate of the result of such appraisal and the costs thereof; and such railroad or corporation shall, within thirty days after the receipt of such certificate, pay to the owner of the stock so killed or damaged, or to his or her authorized agent, the amount of such appraisal, together with all the costs, as aforesaid; and in all cases where the value of such stock is established by this act such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit and certificate of ownership of brand, or affidavit of ownership of said stock, and, if any such company shall so fail to pay for such stock within thirty days after the delivery of such affidavit and certificate, such company shall be liable for double the value the appraised or schedule value of any such animal or animals, together with reasonable attorneys' fees, to be allowed by the court; and all persons selected or appointed under this section shall receive the sum of one dollar, to be paid by said railroad company or corporation, as hereinbefore provided: provided, that any railroad company having fenced its line of road, or any part thereof, or who may hereafter fence its road, or any part thereof, with a good and lawful fence, and put in good and sufficient cattle-guards, and have put in gateways upon and across their said railroad, at the request of persons holding or owning land adjacent to said railroad, for the private use and accommodation of said adjacent owners or holders of land, said railroad company shall not be held liable for the killing or injury of any stock getting through said gateways, belonging to said party at whose request and for whose accommodation said gateway was made, unless such killing or injury was occasioned by the fault or negligence of said railroad company or its employes.

"Sec. 15. Every railroad company shall keep a book at the county-seat of each county through which their road runs: provided, that said road runs or passes through the county-seat. If such railroad does not pass through the county-seat, then such book shall be kept at the principal town in the county through which it passes; and it is hereby made the duty of the said company to cause to be entered in said book, within fifteen days after the killing of any animal, a description, as nearly as may be, of such animal, its color, age, marks, and brands, and shall keep said book subject to the inspection of persons claiming to have had animals killed. Should

any company fail to keep said book, or to file such notice, in the manner herein provided, or to enter therein such description of any animal killed, for a period of fifteen days thereafter, such company shall be liable to the owner of such animal to an amount twice the full value thereof." Gen. St. 1883, p. 814; Sess. Laws 1885, pp. 304, 338.

Wadsworth was plaintiff below. The Union Pacific Railway Company was defendant. At the October term, 1887, the cause was tried by a jury, and verdict rendered in plaintiff's favor. A motion for a new trial was interposed by defendant, and at a subsequent term the following proceedings were had and entered of record: "And afterward, and on the 25th day of April, 1888, the same being one of the regular juridical days of the April, 1888, term of the said court, the motion for new trial aforesaid having been continued for further hearing to said last-named term, and having been argued in chambers meanwhile in vacation, and now coming on for final hearing and determination, and the court, being of the opinion that said motion should be allowed, but plaintiff electing to stand by his case as made, doth order and adjudge that, there being no evidence that defendant's engine or cars ran over or against the horse of plaintiff herein in question, said animal, upon the contrary, appearing to have run into or against the moving train of defendant's cars, this action of plaintiff, under the statutes counted upon therein, does not lie, and the same, the evidence, and the verdict herein notwithstanding, is dismissed at the cost of the plaintiff." The plaintiff seeks a reversal of this judgment by writ of error.

Bailey & Wilkin, for plaintiff in error.

Teller & Orahod and *C. M. Kendall*, for defendant in error.

ELLIOTT, J.—The dismissal of the action, as shown by the record, is assigned for error.

1. The dismissal was somewhat irregular, but it is not difficult to understand its meaning. The cause had been tried by jury, resulting in a verdict in plaintiff's favor, finding that the value of the horse killed was \$200, and assessing plaintiff's damages at \$400 on each of the two causes of action. Upon consideration of defendant's motion for a new trial, the court was of opinion that it should be allowed, and so announced its conclusion. Thereupon plaintiff declared that he elected to stand by his case as already made, and the district court then and there dismissed the action at plaintiff's costs. The declaration of plaintiff was equivalent to saying that he could not prove any better case, and that he desired to obviate the necessity for another trial. The bringing of the whole record to this court for review, in-

Implied agreement to dismiss action.

cluding the bill of exceptions, containing "all the testimony offered, given, or received on the trial," clearly indicates that the intention of the parties was to treat the action of the court as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury." That such was the understanding and intention of plaintiff as well as the defendant is confirmed by the fact that the assignments of error and argument of counsel in this court extend to the conclusions of the trial court upon the evidence, the pleadings, and the statutes upon which the action is founded.

2. The Code of Civil Procedure contemplates that the substance, and not the mere form, of judicial proceedings shall be regarded in determining the rights of parties; hence we shall review this cause according to the intention of the parties, as above stated, since it is obvious that the ends of justice will be thereby accomplished. Code, § 78, also section 443; *Railway Co. v. Chandler*, 8 Colo. 376; *Town of Idaho Springs v. Filteau*, 10 Colo. 105, 20 Am. & Eng. Corp. Cas. 431.

3. Upon a careful examination of the evidence we are of the opinion that the court would not have been justified at the close of the evidence in dismissing the action or in granting a nonsuit on the ground that there was no evidence tending to prove that defendant's engine or cars ran over or against the plaintiff's horse, as stated in the finding of the court. The evidence on that phase of the case was somewhat conflicting, or of such a character that different conclusions might have been reasonably drawn therefrom; and so the evidence did not present a question of law for the court, but one of fact for the jury under proper instructions. 2 *Thomp. Trials*, § 2242 *et seq.*; *Lord v. Refining Co.*, 12 Colo. 394; *Denny v. Williams*, 5 Allen, 1-5.

4. But it is contended that, though the grounds for dismissing the action, as stated in the court's finding, are not sufficient in law, yet the judgment of dismissal should be upheld, since the record discloses other facts which, as a matter of law, show that plaintiff was not entitled, in any event, to recover in the action.

5. The complaint contains two causes of action. Each count is founded upon certain provisions of the statute relating to stock killed by the operation of railroads. The killing occurred in June, 1886; hence we must consider the law as it existed at that time. See *Gen. St.* 883, c. 93, § 2804 *et seq.* Also acts amendatory thereof,—*Sess. Laws* 1885, pp. 304, 338. Neither count of the complaint alleges any negligence on the part of the defendant company in respect to the killing of plaintiff's horse. Prior to

Stock-killing
acts con-
strued.

the act of 1885, above cited, it was provided by statute that any railroad company operating its road within this state which should damage or kill any domestic animal by running any of its engines or cars over or against such animal should be liable to the owner of such animal for the damages thereby occasioned. The statute contained a fixed schedule of prices to be paid for certain kinds of animals so killed. It also provided for an appraisement of the value of the animals for which no schedule price was fixed, but the appraisement was required to be made without any trial in court, and no proof of negligence on the part of the railway company was required in order to establish its liability. By the act of 1885 an amendment to section 14 was added, relating to fences, cattle-guards, and gateways, by which it was provided that under certain circumstances a railroad company should not be held liable for the killing or injury of any stock, unless such killing or injury was occasioned by the fault or negligence of the company or its employes. This peculiar *proviso* was again amended in 1891 (Sess. Laws, p. 281), but the amendment was too late to affect this case. The first count of the complaint contains an averment to the effect that defendant's railway line, at the place where plaintiff's horse was killed, was not then and there fenced with a good and lawful fence, or with any fence whatever; also a further averment that "said railway line, at the point thereon of said killing, was not fenced as by said statute advised." These averments were not sufficient, under the act of 1885. According to the terms of that act, before plaintiff could claim that the defendant's company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway; that he had requested defendant to fence its railroad, put in cattle-guards and gateways; and that his horse was killed by reason of defendant's neglect to comply with such request. The complaint does not contain such allegations. Moreover, according to the strict terms of the *proviso*, the company could not, even by fencing, putting in cattle-guards and gateways, exempt itself from the unconditional liability otherwise imposed by the statute, except as against the party requesting the gateway to be made. From the foregoing it follows that, in order to warrant a recovery for plaintiff under the first count of his complaint, as the statute existed when the first alleged cause of action arose, it must be held, unconditionally, that if any railroad company operating its road in this state should damage or kill a domestic animal by running its engines or cars over or against such animal, the railroad company would be liable therefore, irrespective of any act of negligence on the part of such company.

If such statute were valid, then, according to its literal terms, plaintiff's right to recover must be upheld.

6. Counsel for plaintiff rely upon the case of *Railway Co. v. De Busk*, 12 Colo. 294, as sustaining the stock-killing statute as it existed under the act of 1885. In that case a statute declaring that every railroad company shall be liable for all damages by fire that is set out or caused by operating its road, in this state, was upheld as constitutional, the court holding that "such statutes are not penal, but purely remedial in their nature," and that the liability thus declared "was but the re-enactment, *pro tanto*, of the ancient common law, for the better protection of property exposed to such unusual dangers." The conclusion in the *De Busk* Case was sustained by numerous decisions by courts of last resort in other states having fire statutes similar to our own. As early as 1847 Chief Justice SHAW declared that the design as well as the legal effect of such a statute was to afford indemnity to those suffering damage from fire caused by the use of a dangerous apparatus. This same view was again expressed in 1863 by Chief Justice BIGELOW, as follows: "It is not a penal statute, but purely remedial in its nature; and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed." *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99; *Lyman v. Railroad Co.*, 4 Cush. 288; *Pratt v. Railroad Co.*, 42 Me. 579; *Smith v. Railroad Co.*, 63 N. H. 25; *Ross v. Railroad Co.*, 6 Allen, 90; *Rodemacher v. Railway Co.*, 41 Iowa, 297. It is true that in the *De Busk* Case various decisions relating to stock-killing statutes were referred to and commented upon by way of analogy or illustration. Such references and comments are not to be taken as sustaining the validity of the stock-killing statute. The question of the validity of such statute was not then before the court. As was said in *Johnson v. Bailey*, 17 Colo. 69: "It is not every remark in a judicial opinion that amounts to a judicial decision." In *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice MARSHALL said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their rela-

tion to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The decision in *Railway Co. v. Henderson*, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559, cannot be considered as upholding the constitutionality of the stock-killing statute. True, it was remarked in the opinion in that case that the statute was a cumulative remedy; but the real question decided was that the statute did not repeal or suspend the common-law action for damages occasioned by negligence, and the judgment of the lower court was affirmed upon the ground that the evidence fairly tended to establish negligence. The first point of the syllabus in the *Henderson* Case was, therefore, unwarranted by the decision. In *Railroad Co. v. Lujan*, 6 Colo. 338, the decision turned upon a question of pleading. It does not appear that the constitutionality of the stock-killing statute was challenged, either in the *Lujan* Case or the *Henderson* Case. The maxim "*stare decisis*," therefore, cannot be fairly invoked as sustaining the constitutionality of such statute.

The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common-law rule was, as stated in the *De Busk* Case, that "a person who makes a fire must see that it does no harm, and must answer for the damage, if it does any." In the case of domestic animals, the general rule at common law was that, if such animals trespassed upon the lands of others, the owner was liable in damages, unless he could show that the lands should have been fenced. Besides, the rule at common law was that a party running coaches or other vehicles could be held liable for damages caused by such vehicles on the ground of negligence or wilful misconduct, but not when the damage was the result of pure accident. Since by the progress of invention vehicles propelled by steam and electricity have come into use as a means of transporting persons and property, the common-law rule of liability on the ground of negligence has been applied to the operation of such vehicles, though a higher degree of diligence has been required on account of the greater liability to injury arising from the use of a more dangerous motive power. But we are not aware that it has ever been held as a common-law rule that steam or electric railway companies, lawfully operating their trains, are liable for damages thereby occasioned in the absence of negligence.

By virtue of statutes, however, railway companies have frequently been required to provide additional safeguards against accidents and injuries to persons and property from the op-

eration of their trains. These requirements have been upheld as valid police regulations, and omissions to comply therewith have been held to constitute sufficient ground of liability. For example: It has been held that a statute requiring a railroad company to fence its line of railway is a valid police regulation, and in states where such statutes have been adopted railway companies have been held liable for injuries done to domestic animals where the injury is shown to have been occasioned by the neglect of the company to fence its railway. The element of neglect is the basis of liability in such cases. Perhaps the same rule may apply where the statute gives railway companies the option of fencing their roads on pain of being held liable for injuries caused to animals through neglect to avail themselves of the opportunity of fencing. *Hayes v. Railroad Co.*, 111 U. S. 228, 15 Am. & Eng. R. Cas. 394; *Railway Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 657; *Railroad Co. v. Peoples*, 92 Ill. 97; *Wilder v. Railroad Co.*, 65 Me. 332; *Barnett v. Railroad Co.*, 68 Mo. 56; *Thorpe v. Railroad Co.*, 27 Vt. 140; *Dacres v. Navigation Co.*, 1 Wash. St. 525.

7. It is earnestly contended that the stock-killing statute as it existed under the act of 1885 was unconstitutional. The power of the courts to declare legislative acts unconstitutional should be exercised with that delicacy and consideration which are always due to a co-ordinate department of the government. So long as a legislative act is within the sphere of legislative power—that is, so long as it is not an encroachment upon the province of some other department of the government—it will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured. The conflict between the legislative act and some specific provision of the fundamental law must, in general, be clearly apparent, or the act will not be deemed unconstitutional. That a statute may, in the opinion of the court, be against the spirit of the constitution, or against the policy of the government, is not sufficient to warrant the court in declaring it unconstitutional. The courts cannot arrest unwise or oppressive acts of legislation so long as such acts are within constitutional bounds. *Cooley*, Const. Lim. (6th ed.) c. 7.

8. Stock-killing statutes similar to our own have been considered and held unconstitutional in several states. The court of appeals of this state has also expressed a like opinion. These decisions have been placed upon various grounds. The statute in question was obviously intended to be remedial as well as penal. *Suth. St. Const.* §§ 208, 359. The statute cannot be sustained upon the ground that it is penal. It lacks

an essential element of a penal statute, in that it permits the penalty to be visited upon a party not guilty of doing anything prohibited, or of violating any duty imposed by law. Potter, Dwar. St. 74. The statute cannot be classed as merely remedial, nor as a statute of indemnity, in that it fixes the amount to be paid for certain kinds of animals by an arbitrary schedule of prices without allowing proof of their actual value. As to other kinds of animals, also, it provides for fixing their value by appraisers, without allowing proof of their real value, and in a certain contingency the value may be fixed by a proceeding wholly *ex parte*. It is no answer to these objections that the schedule of prices may be reasonable, or that railroad companies may join in the appraisement proceedings. A statute cannot be considered merely remedial or compensatory which compels a party to pay for property destroyed without allowing him to produce evidence of its value. It is true the statute says that "no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged;" but nowhere in the statute is there any provision for an ascertainment of such value by evidence or by the usual mode of hearing and trial, or by any mode of actual trial. The statute not only makes a railroad company unconditionally liable for any domestic animal it may kill or damage, but it deprives the company of the mode of trial afforded to other litigants in like cases. By the terms of the statute, when the value of an animal is fixed by the schedule, neither party can vary the same; in the appraisement of other animals neither party can be heard by witnesses or counsel. This would seem to bear equally against both parties, but it does not. The remedy of the statute being cumulative, the owner of animals killed or damaged may resort to the statute, or he may rely upon his common-law action, as was held in the Henderson Case. Suth. St. Const. § 399. But when the owner resorts to the statute, there is no alternative for the railroad company, if the statute be upheld. In these respects the statute denies to railroad companies "the equal protection of the laws." It provides that they may be subjected to liability and to a judgment without opportunity for hearing or trial according to "the law of the land," and thus they may be deprived of their property "without due process of law." Such a statute cannot be upheld as constitutional. In this connection the language of Mr. Webster is most appropriate: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Const. U. S. art. 14; Const. Colo. art. 2, § 25; Cooley, Const. Lim. (6th ed.) 431; East

Kingston v. Towle, 48 N. H. 65; *County of San Mateo v. Southern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 1; *Railway Co. v. Outcalt* (Colo. App.), 31 Pac. Rep. 177; *Graves v. Railroad Co.*, 5 Mont. 566, 19 Am. & Eng. R. Cas. 436; *Dacres v. Navigation Co.*, 1 Wash. St. 525.

9. We do not decide that the legislature has not the power to enact a valid statute making railroad companies liable for domestic animals killed or damaged by the operation of their trains, irrespective of the question of negligence. What we decide is that, as the statute did not require the fencing of railways, either imperatively or optionally, under such circumstances as are disclosed in this record, there was no basis for a penalty, and that the mode prescribed by the statute for enforcing liability as a matter of indemnity is in violation of constitutional rights.

Power of legislature to regulate railroads.

10. By the second count of the complaint plaintiff seeks to recover twice the full value of the animal killed. This recovery is claimed on account of the alleged failure of the defendant company to keep the book and to file notice therein of the killing of said animal, as required by amended section 15 of the statute. If we were at liberty to ignore amended section 14, the question of the sufficiency of the second count might be somewhat difficult of determination. But we are of the opinion that section 15 must stand or fall with the other sections of the statute considered in this opinion. It evidently was not designed that there should be a trial, as in other civil actions, to ascertain the actual value of the animal killed under section 15, while the schedule price or statutory mode of appraisement as provided by section 14 should be resorted to for other purposes; nor was it, in our opinion, the design of section 15 to give the owner of an animal killed twice the full value thereof in addition to the schedule price or appraised value, or double that sum, as provided by section 14. The sections of the statute considered in this opinion must be construed together as dependent, and not as independent provisions.

Our conclusion is that, while the reason given for the dismissal of the action by the district court was not warranted, nevertheless, under the law as it then existed, no valid judgment could have been rendered upon the pleadings, and therefore the judgment of dismissal must be affirmed.

Property in Animals Killed — When Sufficient to Justify Recovery. — In *St. Louis, I. M. & S. R. Co. v. Taylor* (Ark., Jan. 7, 1893.), 20 S. W. Rep. 1083, it was held, in an action against a railroad company for the value of a mule killed by the defendant's engine, that the plaintiff had a special property in the animal killed which empowered him to recover its full

value, where he testified that he had possession of the mule, but had not paid for it, and that he did pay for it after it was killed.

In *Central Railroad & Banking Co. v. Bryant* (Ala., June 17, 1892.), 15 S. E. Rep. 537, it was held that a husband could not recover anything for the killing of an animal worth \$150, belonging to his wife, although it may have been procured by an exchange of a similar animal belonging to her, with the addition of \$25 paid by him in cash out of his own means.

In *Kansas City, M. & B. R. Co. v. Cantrell* (Miss., Jan. 16, 1893.), 12 So. Rep. 344, it was held that an action against a railroad company for the killing of stock cannot be brought by one person for the use of another. The court said: "It is settled that actions of this character are in their nature *ex delicto*. *Railroad Co. v. Fort*, 44 Miss. 423; *Railroad Co. v. Andrews*, 61 Miss. 474. In actions of tort there cannot be a use; and, if one is named, his rights must be disregarded, and the plaintiff will fail of recovery unless the right of the nominal plaintiff be proved. This rule has been applied by this court in various classes of actions,—in trespass, *Brown v. Thomas*, 26 Miss. 335; *Lacoste v. Pipkin*, 18 Smedes & M. 590; in detention, *Hundley v. Buckner*, 6 Smedes & M. 75; and in replevin, *Pearce v. Twichell*, 41 Miss. 344; *Meyer v. Mosler*, 64 Miss. 610."

ILLINOIS CENTRAL R. CO.

v.

CRIDER.

(91 *Tennessee*, 489.)

Constitutionality of Statute—Number of Subjects Embraced.—When the object of an act is to subject railroad companies operating unfenced tracks to absolute liability for all damages resulting from their unfenced condition, there can be no constitutional objection to embodying in the same act the means by which this liability may be ascertained and enforced, and if the means are in themselves valid their inclusion in the act would not subject it to the inhibition of the constitution concerning bills containing more than one subject.

Failure to Fence Railroads—Conclusive Evidence—Statute Construed.—The said statute is not unconstitutional, as being class legislation, on account of applying only to unfenced railroads, since the end sought by this act is the prevention of accidents on railroads by compelling the inclosure of the track in such manner as to prevent live-stock from going on the roads, the duty being imposed not so much in the interest of the owners of the animals as in the interest of the general public, under the police power of the state.

Value of Stock Fixed by Appraisers—Prima-facie Evidence.—Where the failure to fence a railroad is made conclusive evidence of negligence whenever live-stock is killed upon such unfenced road, the statute is not unconstitutional by reason of making the valuation fixed by a board of appraisers *prima-facie* evidence of the value of the stock killed, since the report of the appraisers might be contradicted and set aside.

Punitive Damages—Imposition of Attorney's Fees upon Railroad Company.—A provision of the said act making a railroad company liable for an increase of damages to the extent of all reasonable attorney's fees, in

the event that it shall unsuccessfully litigate its liability for such *prima-facie* value established by the said appraisers, is not unconstitutional as imposing a burden upon one class of litigants in favor of another, since this legislation is intended to compel railroad companies to fence their tracks and is within the police power of the state.

"Court" Construed to Mean Judge and Jury.—Where the statute declares that the said reasonable attorney's fees "shall be fixed by the court trying the case," the word "court" must be construed to mean judge and jury.

Repeals and Amendments by Implication—Recital in Caption.—The said statute is not invalid because it amends in part another statute without reciting or otherwise mentioning the amended law, since the provision of the constitution requiring such recital does not apply to repeals or amendments resulting from necessary implication.

ERROR from circuit court, Weakley, Tipton, and Lauderdale counties.

Jas. E. Jones, for plaintiff in error Illinois Cent. R. Co.

Chas. M. Ewing, for defendant in error R. A. Crider.

Sanford & Yound and John G. Miller, for plaintiff in error Newport News & M. V. R. Co.

Baptist & Boals, for defendant in error N. W. Barbour.

Thos. Steele and Holmes Cummings, for plaintiff in error Newport News & M. V. R. Co.

John P. Gause, for defendant in error G. B. Turner.

W. E. Lyon, for defendant in error W. M. Claybrook.

LURTON, J.—These four cases have been heard together. They present but one question—the constitutionality of the act of 1891, c. 101, making unfenced railroads liable for all damages to owners of live-stock killed or injured by moving trains of cars or engines.

The first objection which has been urged is that the act embraces more than one subject. The title is as follows:

<p>Constitution- ality of act— Number of subjects embraced.</p>	<p>"An act to require the section-master of railroads to give notice of the killing or injury of live-stock by the trains or locomotives of railroads in Tennessee; to provide for the appointment of appraisers to ascertain and fix the value of such stock, or the amount of injury thereto; and to provide for the collection</p>
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of such appraisements; to make railroad companies liable for all damages by reason of the killing or injuring of live-stock upon or near their unfenced tracks by their moving trains, cars, or engines." The subject of this act is the liability of unfenced railroads for all damages resulting to live-stock killed or injured by moving engines or cars. This subject is clearly indicated by the last clause in the title, which we have indicated by italics. The preceding clauses of the title were unnecessary. They are but statements as to the subdivisions of the

act, and point out the measure of the damages and the manner in which these damages are to be ascertained and enforced. When the object of an act is to subject railroad companies operating unfenced tracks to absolute liability for all damages resulting from their unfenced condition, we can see no reasonable objection to embodying in the same act the means by which this liability may be ascertained and enforced, as well as provision for the increase of such damages under conditions named in the act. If the means are in themselves valid, their inclusion in the act will not subject it to the inhibitions of the constitution concerning bills containing more than one subject. So, if these subdivisions relating to details be *germane* and relating to the subject of the act, their inclusion in the title, while unnecessary, will not operate to make it an act having more than one subject. The well-settled rule is that this provision of the constitution should be construed liberally, otherwise it would operate to embarrass legislation without advancing the beneficial purpose intended, which was to prevent combinations of incongruous subjects in one bill, with the object of drawing to the support of the whole bill members who might wish to support but a part. Only the general object of an act need be stated in the title, but under such title all the details by which that object is to be attained may be included. *Luehrman v. Taxing Dist.*, 2 Lea, 445; *Ex parte Griffin*, 88 Tenn. 547.

2. It is next objected that the act is void, as being class legislation, and obnoxious to article 11, § 8, of the constitution, which prohibits the passage of any law for the benefit of individuals inconsistent with the general laws of the land; and as prohibited by section 8 of article 1, as not being due "process of law," or "the law of the land." Under this head it is urged (1) that it is applicable only to a limited class of persons—Failure to fence railroad —Conclusive evidence of negligence. unfenced railroads; (2) that it operates in favor of owners of live-stock only; (3) that it provides for an *ex parte* appraisement of values by a tribunal unknown to the law, which is to sit in secret, and judge without a hearing; (4) that it makes the offending corporation liable for the fee of adversary counsel if it shall unsuccessfully contest its liability for the appraised value. Many of these objections are predicated upon the assumption that the statute is a mere piece of machinery for the more speedy collection of live-stock claims against railroads. If this view of the act be the true one, then it does present many very serious questions of constitutional law. In our judgment, the act has a wider purpose, and rests upon much higher and broader consideration. The end sought by this legislation is the prevention of accidents on railroads,

by compelling the inclosure of the track in such manner as will prevent live-stock from going on the roads. Failure to fence is made conclusive evidence of negligence whenever live-stock is killed or injured upon such an unfenced road by moving engines or cars. The liability of the company for actual damages is made the consequence of the failure to fence; and, if the offending company refuses to pay the *prima-facie* value of such stock as ascertained in the mode prescribed by the act, then it is made liable for an increase in the damages to the extent of reasonable attorney's fee in the event it shall unsuccessfully litigate its liability for such *prima-facie* value. The duty of fencing, and the resulting liability for failure to perform such duty, is imposed not so much in the interest of the owner of animals which may go upon an unfenced road, as in the interest of the general public, who are concerned that accident shall be avoided, and public travel be made as safe as the exigencies of that manner of transportation will permit. The authority for requiring railroads to fence in their tracks is found in the general police power of the state. The duty may be imposed by an affirmative statute, and enforced by fines, forfeitures, and penalties; or it may be indirectly imposed, as in the act under consideration, by subjecting unfenced roads to liabilities and penalties from which roads recognizing the duty are exonerated. The enormous power and great momentum of railway engines render such protection a reasonable requirement against the unnecessary destruction of private property and accidents to persons traveling by such conveyance.

"This police power of the state," says an eminent judge, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state, according to the maxim, *sic utere tuo ut alienum non ledas*, which, being of universal application, it must, of course, be within the range of the legislative action to define the mode and manner in which every one may so use his own as not to injure others." By this general police power of the state "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." REDFIELD, C.J., in *Thorpe v. Railroad Co.*, 27 Vt. 140. The constitutionality of such statutes has often been questioned, but they have been, it is believed, unfairly sustained as a valid exercise of the police power. *Gorman v. Railway Co.*, 26 Mo. 441; *Wilder v. Railroad Co.*, 65 Me. 333; *Thorpe v. Railroad Co.*, 27 Vt. 140;

Railroad Co. v. Humes, 115 U. S. 522, 22 Am. & Eng. R. Cas. 557; Blair v. Railroad Co., 20 Wis. 267; Railroad Co. v. Dumser, 109 Ill. 402, 19 Am. & Eng. R. Cas. 545; Railroad Co. v. Riblet, 66 Pa. St. 164; Spealman v. Railroad Co., 71 Mo. 434, 2 Am. & Eng. R. Cas. 636; Small v. Railroad Co., 50 Iowa, 338, and many other cases, 7 Amer. & Eng. Ency. Law, p. 910, and cases cited.

The objection that the act creates a new judicial tribunal for the appraisement of values of stock killed upon an unfenced road is not well founded. If the valuation fixed by the board of appraisers was made conclusive evidence against the company, the act would be subject to severe criticism. But by the express terms of the statute this appraisement is duly made "*prima-facie* evidence of the value of said stock, or damage as to that crippled." If the company admits its liability, and pays this value, that is the end of the matter. If it choose to contest either the valuation or its liability, it may do so, and every opportunity is afforded it to present its defence. In such contests this appraisement is only *prima-facie* evidence of the single fact of value. It is not made evidence as to the ownership of the stock, nor that the stock was killed by the moving engine or cars of the defendant, nor that the track of the defendant road was unfenced. As *prima-facie* evidence of value it will stand in lieu of proof until some evidence contradicting it is submitted. When this is done, the question of value, like all other questions of fact necessary to make out the plaintiff's case, must be determined upon the preponderance of proof. The fact that three sworn and disinterested appraisers, after examination of the animals, have agreed upon and certified to a certain valuation, is made by the statute *prima-facie* evidence of the value. There can be no serious doubt as to the power of the legislature to make such an appraisement, although, without notice, *prima-facie* evidence of the truth of the appraisement. Concerning the power of the legislature, an eminent authority says: "As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules, which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights." Cooley, Const. Lim., side-page 368.

With the limitations stated, such statutes as the one in question have been uniformly upheld. Code, § 1301, which provides that the burden of proof shall be upon the railroad company when sued for killing stock to show that the acci-

dent was unavoidable, is a striking instance of an act shifting the burden of proof to the extent of requiring the defendant to prove a negative. So by another statute the *ex-parte* certificate of a notary public that he had made demand and given notice of the dishonor of negotiable paper is made *prima-facie* evidence of the fact of such notice. So statutes which make tax deeds *prima-facie* evidence that all the proceedings have been regular have been upheld, although such deed would not otherwise have any such force or effect, and the party claiming under one would, at common law, have to establish the regularity of the successive steps leading to the deed. Statutes making defective records evidence of valid conveyances are of similar nature.

3. Does the imposition of an attorney's fee, in case the railroad company unsuccessfully litigates, violate any constitutional right? In our view, plaintiff can only recover such fee

Imposition of attorney's fee upon railroad company. in case there is a recovery of the appraised valuation. If he fails to sustain the appraisement, the defence has been in part made out, and the defendant is not to be overrated with any fee. But it is said that the effect of this provision is to compel the company to pay the appraised value, or submit to the imposition of a penalty, in case it elects to exhibit its defence in the courts of the county, and shall be unsuccessful. It is argued that this is the imposition of a burden upon one case of litigants in favor of another, and violates the constitutional rule which requires equality of right, privilege, and exemption. These objections overlook the fact that this legislation is intended to compel railroad companies to fence in their tracks; and that the liability imposed is a consequence of failure of the offending company to adopt so necessary a means toward the protection of the property of others, and as a precaution against accidents resulting from the presence of animals on the road, thus endangering the safety of those controlling, and then using, so dangerous a mode of conveyance. If the state may, in the exercise of its police power, compel all railroad companies to fence in their tracks, it may enforce such policy by making the offending company liable to all who sustain injury by neglecting such precaution. To this effect is the weight of decisions we have already cited. To attain this end, it is not obliged to stop at mere compensation, for it may blend public and private interests by permitting a recovery in excess of actual damages. This principle finds illustration in the common law, which permits, in cases where the wrong is so grave as to demand punishment, a recovery of a sum in excess of mere compensation as exemplary or punitive damages. In many cases, where such damages are admissible, the interests

of society and of the person injured are united, and this additional damage inflicted is permitted to be taken by the individual injured, although it is imposed as a punishment in the interest of the public. If at common law the damages inflicted upon a wrong-doer may be in excess of mere compensation whenever the interests of society are affected or are to be subserved, it must be obvious that the lawmaking power may prescribe the measure of such additional damages, and determine its disposition. Upon this ground statutes imposing double damages against unfenced railroads have been sustained as within the police power of the state.

In the case of *Railroad Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, the constitutionality of a statute of Missouri imposing double damages upon unfenced railroads for live-stock killed or injured was involved. The statute had been sustained by the court of Missouri. Upon writs of error to the United States Supreme Court a similar conclusion was reached; the provisions of the constitution of the United States in regard to "due process of law," etc., being substantially identical with that in the constitutions of both Missouri and Tennessee. "The power of the state," said that court, "to impose fine and penalties for a violation of its statutory requirements, is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state in the Union provide for the increase of damages when the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. * * * The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." *Railway Co. v. Terry*, 115 U. S. 523.

The state has not by this act imposed double or treble damages, as it might have done, but it has subjected the offending company to actual damages and to an increase of this damage to the extent of the reasonable attorneys' fees incurred by the successful plaintiff in the establishment of his claim. This additional penalty is not imposed except upon the contingency that the company shall refuse settlement upon the basis of the *prima-facie* valuation, and upon the further condition that the owner of the live-stock killed

or injured shall establish both the liability of the company and that the appraised value was not excessive. What the state may impose as a penalty without condition it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation, was wholly within the legislative discretion. The additional or increase of damages, in case the company unsuccessfully contests its liability for the full amount of the appraisement, is to be measured by the reasonable expense thrown upon the plaintiff in what is there established to have been an unnecessary litigation. The view here taken of this act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the state, it is not objectionable that additional or increased damages are imposed upon such terms and subject to such contingencies as the public interest shall demand. Our Code furnishes many illustrations of the imposition of penalties and forfeitures under the police power of the state. In some cases such penalties are turned over to the relator, though he have no special interest; in others the recovery is divided between the state and the party suing; and in still others the state retains the whole.

We have been cited to two cases which are supposed to support the contention of the learned counsel that the imposition of the reasonable fee of an attorney is invalid, as partial legislation: *Railroad v. Williams*, 49 Ark. 492, 31 Am. & Eng. R. Cas. 555, and *Wilder v. Railroad Co.*, 70 Mich. 382, 35 Am. & Eng. R. Cas. 162. The first is an Arkansas case, and arose under a statute of that state entitled, "An act to provide for the settlement of claims for stock killed or injured by railroads." The statute provides for an arbitration, and imposes the fees of adversary counsel in case the award was not paid. The case is to be distinguished from this in many particulars. The act was not one intended to compel the fencing of railroads, and was purely an effort to compel submission to an award. The other arose under an act in its general scope very much like our own. The court treated it also from the standpoint that it was the imposition of a burden upon one class of litigants not imposed upon all others. The views here taken, that such added liability was but the imposition of additional damages, and was a valid exercise of the police power, were never considered. Acts similar to our own in respect to this feature have been sustained by reasoning more satisfactory to us. *Railroad Co. v. Duggan*, 109 Ill. 537, 20 Am. & Eng. R. Cas. 489; *Railroad Co. v. Mower*, 16 Kan. 573;

Railroad Co. v. Shirley, 20 Kan. 660 ; Railroad Co. v. Abney, 30 Kan. 41, 13 Am & Eng. R. Cas. 640.

4. In the case of Railroad v. Crider, the learned circuit judge construed this act as requiring the judge trying the case to adjudge what should be reasonable at-
 torneys' fees, and to add such fees to the amount of plaintiff's recovery as determined by the jury. Judge and Jury.

In the other cases heard along with the Crider Case, but coming from a different circuit, the question of the amount of the fee was submitted to the jury. The contention now made is that the act requires the amount of such additional damages to be fixed by the judge, and that the defendant is therefore denied the right of jury trial. The language of the act concerning this matter is that "this fee shall be fixed by the court trying the case." The meaning of "court" depends upon the connection in which it is used. It may refer to the place where justice is judicially administered. The term, as defined by Mr. Bouvier in his dictionary, is this: "The presence of a sufficient number of the members of a body in the government to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time, engaged in the full and regular performance of its duties." To determine whether the term is used as signifying the judge alone, or the tribunal, which may consist of judge and jury, resort must be had, if the term be used with reference to the form of trial, to the nature of the question submitted, and to the mode generally in use in the tribunal for the trial of similar questions. Clearly, if the case is one in which a jury is permissible, and the other matters involved have in fact been submitted to a jury, then this matter of the amount of such fee is to be submitted likewise to the jury. The "court trying the cause" in that event would be the judge and the jury. To construe this cause otherwise would be to suppose that the legislature intended in a jury case to withdraw one question of fact and submit it to the jury alone. Where an act is of doubtful meaning, that construction should be given to it which shall be found in harmony with the constitution. *Horne v. Railroad*, 1 Cold. 74 ; *Manufacturing Co. v. Falls*, 90 Tenn. 466.

It has been argued that this statute is invalid because it amends in part, and repeals in part sections 1298-1300, Mill & V. Code, without reciting or otherwise mentioning the amended or repealed laws ; and that this is prohibited by article 2, § 17, of the constitution. Amendments by implication.
 The sections of the Code referred to are those requiring all railroad companies to observe certain precautions against accident, and making them responsible for all dam-

ages resulting from failure, and exonerating them from liability for damage to persons or property when in the observance of the statute. The effect of this legislation upon unfenced railroads and as to the animals mentioned in the act greatly modifies the former law. But this is brought about by the conflict between an affirmative statute laying down definitely a new rule and the old law. The effect may necessarily be the repeal, modification, or amendment of the law as it formerly stood. The constitutional provision requiring laws repealing or amending former laws to recite in the caption or otherwise the law repealed or amended, does not apply to repeals or amendments which result from necessary implication. *Insurance Co. v. Taxing District*, 4 Lea, 648; *Ballentine v. Morgan*, 15 Lea, 633.

The judgment in the Crider Case must be modified by excluding the attorney's fee added to the verdict by action of the circuit judge. The judgment in the other cases will be affirmed.

Attorney's Fees in Stock-killing Cases.—See note, 20 Am. & Eng. R. Cas. 491.

Duty of Railroad Company to Fence Right of Way.—*Cattle-guards.*—In *Kansas City, F. S. & M. R. Co. v. Grimes*, 52 Kan. 655, it was held that the law imposes the duty upon a railroad to see that proper cattle-guards exist wherever they are required to be constructed. *Railway Co. v. Morrow*, 32 Kan. 217, 19 Am. & Eng. R. Cas. 630.

Where Track Runs through Uncultivated Lands.—In *Stimpson v. Union Pacific R. Co.* (Utah, June 23, 1893.), 33 Pac. Rep. 369, it was held that the statute which makes railroad companies liable for injury to stock, unless they fence their tracks and construct proper cattle-guards where the right of way crosses lands "owned, settled, or occupied by private owners," should be construed to require fences and cattle-guards where the land in the vicinity of a place at which a horse was killed was settled, owned, and occupied by farmers, and belonged to tracts under cultivation though not itself cultivated.

Proper Construction of Fence—Question for Jury.—In *Parker v. Lake Shore & M. S. R. Co.*, 93 Mich. 607, it was held that it was proper to submit to the jury the question whether the manner in which the railroad company had constructed its fences and cattle-guards was a substantial compliance with the statute, and also whether the accident was due to the defendant's failure to properly construct its fences and cattle-guards.

Only Highway Crossing May Remain Unfenced.—In *Parker v. Lake Shore & M. S. R. Co.*, 93 Mich. 607, it was held that the statute which provides that every railroad company shall provide its right of way with "suitable connecting fences and cattle-guards at all highways and street-crossings, which shall at all times be kept in effective repair, and sufficient to keep stock of all kinds from passing upon the track of the railroad at such highway or street-crossing," contemplates that railway tracks shall be exposed within the limits of the highway only; and that, by exposing its right of way and tracks beyond the limits of the highway, the defendant had increased the danger, and rendered itself liable for damage occasioned thereby. *Andre v. Railroad Co.*, 30 Iowa, 107; *Railway Co. v. Newbrander*,

40 Ohio St. 15; Railroad Co. v. Morgan, 38 Ind. 190; Railroad Co. v. Herbold, 99 Ind. 91.

Impracticability of Making Cattle-guards no Defence.—In *Nelson v. Great Northern R. Co.* (Minn., Jan. 16, 1893.), 53 N. W. Rep. 1129, it was held that the neglect to fence a railroad right of way is not excused by the fact that the construction of cattle-guards so as to completely inclose the track is impracticable.

Defective Fences—Duty to Repair.—In *Wines v. Rio Grande W. R. Co.* (Utah, Aug. 30, 1893.), 33 Pac. Rep. 1042, it appeared, in an action against a railroad company for the alleged killing of a mule, that the track where the mule was killed was level and straight for nearly one mile; that the land in that vicinity was owned and settled by private parties; that the railroad fence which defendant was required to keep up along the railroad where the injury was done was down in places; that the cattle-guards were so filled up with dirt and gravel that stock could pass over them on the track. Mule-tracks were discerned between the rails of the track, indicating that the mule when killed was running ahead of the engine with great speed—jumping, as one witness described it, nearly 30 feet at a jump, for a distance of 100 yards, and was then struck and carried along the track ahead of the engine for about 100 feet, and thrown into the street. High grass was allowed to grow on the company's right of way, which was calculated to tempt cattle. The defendant offered testimony tending to show that the fence through which the mule passed upon the railroad track was in good condition on the morning previous to the day of the injury, and that it had been broken down by throwing or driving ties through it during that day. The court said: "The railroad company was bound to use reasonable care in maintaining its fences and cattle-guards. It should use such reasonable care as prudent, careful men would use under like circumstances. What was reasonable care in that regard was a question for the jury to determine, under the evidence and proper instruction from the court. The court properly instructed the jury in this regard that 'the duty of the railroad company is to maintain its fences, but that duty is limited by the fact that it is only to be done with reasonable care. The railroad company is not bound to stand by the fence, the whole length of it, every hour, to see that it is kept up. In keeping and maintaining the fences, it is necessary to use the reasonable care that a prudent man would under like circumstances; and what is reasonable care in that regard is for the jury to determine, and not for the court. If, where this road was partly fenced or not fenced at all, stock got on there, and were killed, for the want of properly erecting and maintaining a fence or cattle-guards, then it is your duty to find for this plaintiff, and assess his damages at the value of the stock killed, with interest, as I have told you.' Upon the issue thus presented, the jury found the defendant negligent. The testimony to justify this recovery was somewhat circumstantial in its character, but sufficient upon which to justify the submission of the question to the jury, and we do not think their findings can safely be disturbed. The plaintiff was not bound to prove more than enough to establish a clear presumption of negligence on the part of the defendant, and a resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence that is sufficient to rebut such presumption. 1 Shear. & R. Neg. §§ 58, 59."

Duty to Fence Private Railroad Crossing.—In *Caldron v. Chicago, St. P., M. & O. R. Co.* (Wis., June 21, 1893.), 55 N. W. Rep. 955, it was held, under the statute requiring railroads to be fenced, that a railroad company was required to fence its track, where it was crossed by a private logging railroad, by providing suitable guards to keep domestic animals off its

right of way, and was liable for damages caused by failure to build the fence.

Gates at Farm-Crossings.—In *Fremont, E. & M. V. R. Co. v. Pounder* (Neb., Feb. 15, 1893.), 54 N. W. Rep. 509, it was held, under the statute, that where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent cattle, horses, etc., from getting on the railroad; and that gates at farm-crossings are a part of the inclosure of the railroad, and must be suitable and amply sufficient to prevent stock from getting on the track.

Question as to What Constitutes a Highway.—In *McNamara v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 95 Mich. 545, under the statute providing that all roads which have been laid out and not recorded, and have been used for eight years or more, shall be deemed public highways, subject to be altered or discontinued, it was held, in an action for the value of a cow killed by a railroad train at a crossing, that where the road had been laid out by a township, and actually used for eight years, it became a public highway, and the mere non-user for two years did not entitle a railroad company whose tracks crossed the road to exclude the public by fencing in its right of way at that point, and that, therefore, the cow was killed on a public highway.

Defective Fence—Liability for Injury.—In *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, an action against a railroad company for the value of a horse killed by the defendant's train, where there was evidence tending to show that a gate had for a long time been suffered by the defendant to be out of repair and unfit for use, and that it had remained open nearly all the time for about two years, and the defendant's section-master had repeatedly passed through it without attempting to shut it, different witnesses testifying that it was in such a condition that it could not be opened or shut by a reasonable effort on the part of those having occasion to pass through it, it was held that the jury might find that the defendant neglected the duty to keep the gate in proper repair imposed upon it by the statute; and the mere fact that the plaintiff's horse escaped from control and passed through the gate of the defendant's tracks did not make him a trespasser or preclude the plaintiff from recovery. *Towne v. Railroad Co.*, 124 Mass. 101; *Amstein v. Gardner*, 132 Mass. 28; *Browne v. Railroad Co.*, 12 Gray, 55.

In *Karr v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 26, 1893.), 54 N. W. Rep. 144, it was held that it was not error to charge the jury that, to entitle a person whose stock is killed or injured by reason of a defective fence along a railroad to recover damages from the railroad company, "it is only necessary for such owner to prove the injury to or destruction of his property," where the jury were also charged that the burden was upon the plaintiff to establish by a preponderance of evidence all the allegations of his complaint, and that the plaintiff could recover in case it appeared that the animal, while running at large, passed on the defendant's track, by reason of its omission to keep its fences in repair.

MINNEAPOLIS & ST. LOUIS R. Co.

v.

EMMONS.

(United States Supreme Court, May 10, 1898.)

Defective Cattle-guards—Compensation to Abutting Owner for Watching Cattle—Consequential Damages.—Where no discrimination is made against any particular railroad company, the legislature of a state has power to subject railroad companies to any incidental or consequential damages, such as the expenses of keeping watch to guard cattle from straying upon its unfenced tracks, such damages being imposed under the police regulations of the state to insure safety to passengers and prevent injury to property.

Damages for Diminished Value of Land on Account of Failure to Fence.—The allowing of damages for diminution in the value of adjoining land caused by failure of the company to fence its railroad is within the police power of the state, and is not a taking of property without due process of law.

Imposition of a Duty not Required by Charter.—The extent of the obligations and duties required of railroad corporations by their charters does not create any limitation upon the power to impose such further duties as may be deemed essential for the safety of the public; and, therefore the requiring of railroad companies to fence their roads through private lands is not a violation of the right conferred by charter to buy and hold lands for specific purposes the same as any other land-owner.

In error to the Minnesota Supreme Court.

The cause was twice before the supreme court of the state before the entry of the judgment now sought to be reviewed. See 29 N. W. Rep. 202, and 36 N. W. Rep. 340.

Albert E. Clarke, for plaintiff in error.

Edward J. Hill, for defendant in error.

FIELD, J.—The plaintiff below (the defendant in error here) is a citizen of Minnesota, and for some years previously and at the commencement of this action was the owner of a farm in that state of 160 acres, which he occupied with his family as a homestead. He inclosed the farm with a suitable fence, cultivated it, and kept stock upon it. In October, 1879, he sold and conveyed to the defendant, a railway corporation organized under the laws of the state, a right of way for a railroad across the farm, 50 feet wide on each side of the road. Soon afterward the company constructed the road on the right of way purchased, but neglected to build and maintain any fences on either side of it, or cattle-guards where the

Case stated.

road enters and leaves the land purchased, as required by the statute of the state; and to recover damages for such failure the present action was brought.

The statute which was passed by the legislature in 1876 provided that all railroad companies in the state should, within six months after its passage, "build, or cause to be built, good and sufficient cattle-guards at all wagon-crossings, and good and substantial fences on each side" of their roads, and declared that they should be liable for domestic animals killed or injured by their negligence, and that a failure to build and maintain cattle-guards and fences as above provided should be deemed an "act of negligence on the part of such companies;" and, by its fourth section, that any company or corporation owning and operating a line of railroad within the state, which had failed and neglected to fence its roads, and to erect crossings and maintain cattle-guards, as required by the terms of its charter and the amendments thereof, should thereafter "be liable, in case of litigation, for treble the amount of damages suffered by any person in consequence of such neglect, to be recovered in a civil action, or actual damages, if paid within ten days after notice of such damages." Gen. Laws Minn. 1876, c. 24.

In 1877 this last section was amended so as to declare that any company or corporation guilty of the failure or neglect mentioned should be "liable for all damages sustained by any person in consequence of such failure or neglect." Chapter 73, Gen. Laws Minn. 1877; Gen. St. Minn. 1878, c. 34, § 57.

On the trial it appeared in evidence that the defendant had operated its road and run daily trains through the farm without building the required fences on each side of its track, or constructing cattle-guards at the wagon-crossings, and the plaintiff, who kept cattle upon his land, was in consequence obliged, at much expense, to watch his cattle, for some years before the commencement of this action, to keep them from being killed by passing trains, which subjected him to great inconvenience, loss of time, and expenditure of money, and deprived him of the free and beneficial use and enjoyment of his land, and lessened its value. He recovered a verdict of \$1000 for the damages sustained, upon which, and for costs, judgment was entered in his favor.

This case had, on a previous occasion, been before the supreme court of the state on appeal. The court below had held that the complaint did not state facts sufficient to constitute a cause of action, and dismissed it, and refused a motion for a new trial. On appeal from the order denying the motion, the ruling below was reversed, and a new trial granted.

Defective
cattle-guards
—Compensation for watching cattle.

In giving its decision the supreme court, among other things, held that to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, was as much within the police power of the state as regulating it with a view to protect life from its dangers; and that the state might, under that power, require railroads to be so constructed, maintained, and operated, and so protected and inclosed, that they would injure as little as possible the farms or lands through or alongside of which they run; and that the legislation of the state having this object in view was valid.

It was objected below that the statute, as thus interpreted, denied to the railroad companies the equal protection of the laws of the state, as required by the first section of the fourteenth amendment. The point of the objection, as indicated in the opinion of the supreme court, so far as we can understand it, was this: That the statute, in requiring railway companies to fence their roads, was a police regulation, having for its object to prevent animals from getting on the tracks, and the consequent danger of injury to the animals themselves and to railway passengers and employes; and, therefore, to impose penalties and authorize a recovery of damages for non-compliance with the law for other than the resultant injuries to animals and railway passengers and employes was in excess of the police power of the state, and a departure from its general law, which imposed penalties and damages only for the direct injuries sought to be prevented, and did not extend them so as to cover consequential and possible resulting injuries.

The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle-guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle, running at large, upon the tracks can be prevented, and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards. It was entirely competent for the legislature to subject the

company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle-guards. No discrimination is made against any particular railroad companies or corporations. All are treated alike, and required to perform the same duty; and therefore no invasion was attempted of the equality of protection ordained by the fourteenth amendment.

It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining land-owners, or to pay damages for not building them, imposes upon the company a duty not required by contract, common law, or its charter, and is therefore a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land-owner's.

Imposition of
a duty not re-
quired by
charter.

To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employes, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the powers of the states in this respect.

The objection that by allowing damages for the diminution of value in the adjoining farm, caused by the failure of the company to fence its roads and to construct proper cattle-guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages, which we hold to be within the discretion of the legislature to impose.

Judgment affirmed.

Constitutionality of Fence Laws.—See note, 22 Am. & Eng. R. Cas. 564.

Failure to Fence—Damages for Loss of Pasture, etc.—In *Nelson v. St. Louis & S. F. R. Co.*, 49 Kan. 165, it was held that, where a railway company builds its road through a fenced pasture, and fails and refuses to erect and maintain cattle-guards at the entrance and exit of its road to and from the pasture, the owner is entitled to recover damages for the loss of the pasture; or, if he puts his animals therein, to reasonable compensation for his efforts in preventing them from straying from the pasture, and injuring the crops on his own premises, or from trespassing on the lands of other persons.

Damages for Decrease in Value of Land on Account of Failure to Fence.—In *Welles v. Northern Central R. Co.*, 150 Pa. St. 620, it was held that the statute which required railroad companies in certain counties to fence their tracks, and providing that, where they failed to do so, any person might build the fence at the expense of the company, did not make the company liable for fencing, where the land-owner had been awarded damages, including the burden of fencing. In this case the court said: "The burden of fencing created by the location and construction of a railroad is a charge upon, and detracts from the value of, the farm through which it passes. This burden may not be limited to, but it certainly includes, the fencing called for by the act under consideration. When the land-owner, in a proceeding for the assessment of his damages, has received compensation for the burden thus imposed, his claim for all fencing made necessary by the construction of the railroad is satisfied; and for such fencing thereafter, whether it is required for his own convenience and protection or for the public safety, he can have no valid claim against the company. It is work done in partial discharge of a burden on his own land, for which he has already been paid. His successor in the ownership of the land, whether as grantee, heir, or devisee, takes it *cum onere*, and has the same rights and duties in relation to the fencing of it as the person from whom he derived title. As already intimated, we are of opinion that the statute under consideration does not undertake to settle the question of the ultimate responsibility for fencing in a case like the present. If it assumed to do so, and required the appellant to finally bear this burden, it would be fairly open to the objection that the legislature had not the constitutional power to enact it. Legislation which demands that one person shall assume and pay the private debt of another is void for want of such power, and an act to compel a railroad company to bear a burden resting upon the land of another, and for which it has once compensated him, would be in the same category."

Measure of Damages for Stock Killed—Evidence—Testimony of Plaintiff.—In *St. Louis & S. F. R. Co. v. Sageley*, 56 Ark. 549, it was held that it was proper to ask the plaintiff, on cross-examination, what he paid for a horse which was killed by the defendant's train, where, in action to recover damages, he testified on his own behalf as to the value of the horse at the time it was killed.

Judgment in Excess of Market Value.—In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 481, it was held that where the judgment as to the value of an animal alleged to have been killed by a railroad company exceeds her market value as shown by the testimony, it is excessive and will be set aside.

Quality of the Breed.—In *Parker v. Lake Shore & M. S. R. Co.*, 98 Mich. 607, it was held that, in estimating the value of a colt killed by a railroad train, it was proper to take the testimony of horsemen as to the value of the get of such stock as the dam and sire of the colt.

In *Richmond & D. R. Co. v. Chandler* (Miss., April 3, 1898.), 13 So. Rep. 267, it was held, in an action against a railroad company for the value of a bull killed by defendant's train, that evidence of the excellence of the breed of the sire and dam of the animal was admissible, but could not fix its market value.

Presumption in Favor of Finding of Referee.—In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 567, in an action against a railroad company for loss of stock, it was held that the finding of a referee as to the value of property not in excess of the market value as shown by clear and uncontradicted evidence, will not be set aside on the ground that it is excessive.

In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 557, it was held that, where the finding of a referee as to the value of a cow killed does not

exceed her market value, as shown by positive testimony, it will not be set aside on the ground that it is excessive.

Action for Exemplary Damages—Actual Damages not Recoverable.—In *Cobb v. Columbia & G. R. Co.*, 37 S. Car. 194, it was held that no recovery could be had for actual damages in an action for exemplary damages.

Double Damages for Failure to Post Notices of Injury to Stock.—In *St. Louis, I. M. & S. R. Co. v. Wright* (Ark., Feb. 18, 1893.), 21 S. W. Rep. 476, under the statute providing that, whenever any stock are killed, wounded, or injured by railroad trains running in the state, the conductor or engineer on the train doing the damage shall cause the station-master or overseer at the nearest station-house to the killing or wounding to post at such house within one week thereafter and to so keep posted for twenty days thereafter a true and full description of such stock, giving the time and place of the killing, in default of which notice the company shall forfeit double damages for such killing,—it was held that the posting of such notice in any public place at the station-house was a sufficient compliance with the statute, but that, where it appeared that no such notice was found posted in the usual place of posting nor in front of the building, and there was no evidence that there were other suitable posting places for such notice, a verdict awarding double damages would not be disturbed.

MISSOURI PACIFIC R. Co.

v.

ECKEL.

(49 Kansas, 794.)

Duty of Railroad Company to Fence Track—Liability for Frightening Animal.—A mare went upon the right of way of a railway company, where it ought to have been, but was not, fenced, and was frightened by a passing train, and was either thrown or ran off of the railroad track into a wire fence located near, but not on, the line of the right of way, and sustained such injuries that she died. *Held*, that the railroad company was liable under paragraph 1252, Gen. St. 1889.

Railroad Along Highway—Duty of Company to Fence.—Where there is a travelled road running parallel with the line of a railway, but a sufficient distance from the railway track to permit the construction of a fence, such railway company is not, by reason of the existence of such travelled road, excused from inclosing its road with a good and lawful fence, to prevent animals from being on its track.

Construction of Stock-killing Act—Definition of Terms.—A statute of the state making railroad companies liable for injury to stock provides that "this act shall not apply to any railroad company or corporation * * * whose road is inclosed with a good and lawful fence to prevent such animal from being on such road." The court charged the jury, after quoting the statute, that "the foregoing does not apply to any railway or corporation * * * whose road is inclosed with a good and lawful fence which prevents such animals from being on such road." *Held*, that the words "which prevents," as used by the court, instead of the language "to prevent," did not mislead the jury.

COMMISSIONERS' decision. Error from Butler district court.
J. H. Richards and *C. E. Benton*, for plaintiff in error.
Redden & Schumacher, for defendant in error.

GREEN, C. — Charles B. Eckel brought an action against the Missouri Pacific Railway Company to recover damages and attorneys' fees for a mare alleged to have been killed by the negligence of the railroad company in the operation of its railroad, in Butler county. It seems that the right of way was not fenced on the north side of the railroad. South of the railroad, and near the south line of the right of way, there was a wire fence constructed and owned by the owner of the adjoining land, running east and west, parallel with the track. North of the railroad, and partially on the right of way, there was a travelled road, which had been used as such for several years, but was not a regularly laid-out highway. The mare in question had been kept in a pasture about a mile and a half from where the accident occurred, but escaped from the inclosure on account of a storm which blew down the fence. She passed over an adjoining field, on the railway track, going in a southwesterly direction. It appears from the evidence that she became frightened by an approaching train from the east, and she either ran or was thrown off of the track into the barb-wire fence on the south line of the right of way, where she sustained such injuries that she died in a short time. The plaintiff obtained a judgment against the railroad company for \$96 damages and \$45 attorney's fees. Case stated.

It is contended by the railroad company that the facts do not authorize a recovery under paragraph 1252, Gen. St. 1889. It is urged that because the mare was not struck by the engine or cars of the railway company, and did not come in contact with any property owned, constructed, or operated by the company, there is no liability. The proposition, as stated by the plaintiff in error, is this: If a horse, while running at large, becomes frightened at a passing train, and in his flight from the train crosses an unfenced railroad, and runs against a wire fence located on the land of another, and which fence was constructed, owned, and controlled by him, is the railway company liable, under the statute, for the injuries sustained? It is conceded that the question might be answered in the affirmative, if it can be said that the object of the fence required by the statute is to exclude animals from the lands of other persons, and thus possibly prevent an injury. We assume it to be one of the objects of the law to require railroad companies operating lines of railroads in this state to Liability of railroad for frightening animal.

fence the same so as to prevent animals from being on such roads. This court has said: "Animals straying upon a railroad track is one of the recognized sources of danger to travel, and, with the increased speed of railroad trains, experience amply demonstrates the necessity of inclosing railroad tracks through inclosed fields, as well as elsewhere, with good and sufficient fences; and, to insure safety and protection to the travelling public, all these necessary precautions are demanded. It is not the landowner who is benefited. The railroad company, in obeying the law, protects its passengers and its property interests as well. The protection is threefold. * * * In the exercise of the ordinary police powers of the state, it has been held reasonable to require railroads to fence their tracks, not alone for the protection of the live stock of the abutting owners. Indeed, the chief object of the statute is the protection of the travelling public against accidents occurring through collision of trains with stock." *Railway Co. v. Harrelson*, 44 Kan. 253, 24 Pac. Rep. 465. As stated by Judge BREWER, in the case of *Railroad Co. v. Jones*, 20 Kan. 527, the language of the statute is very broad, and extends to those cases where animals are injured in any other manner whatever in the operation of such railway. In a very recent case it was held by this court that where an animal was pasturing on the right of way of a railroad, at a place where it ought to have been fenced, but was not, and was frightened by the sounding of a whistle upon an engine drawing a train of cars, and ran along by the side of the track on the right of way into a wire fence running at right angles with the railroad, and was injured, the company was liable under the statute. *Railway Co. v. Gill*, 49 Kan. —, 30 Pac. Rep. 414. In this case the mare got on the right of way and was frightened by the cars, and was either struck or ran off of the track into the fence located near, but not on, the right of way, and was killed. Was the animal injured by reason of the railway company to fence its road? It seems from the evidence that the mare was frightened, while on the right of way, by the passing train, and on account of such fright ran into the fence, and was injured. Was not the operation of the train without a fence inclosing the right of way the proximate cause of such injury? The company left the road unfenced. It knew that animals were liable to stray upon the right of way, and thus be in danger from the operation of its trains. We are of the opinion that the railway company was liable under the statute.

It is next urged that the court erred in refusing to submit certain interrogatories to the jury in regard to a highway on the north side of the railroad track, and also refused to

instruct the jury that if there was a road travelled by the public as a highway along the north side of the railroad, and a portion of such road was on its right of way, the company would be excused from fencing its road on that side, and would not be liable for damages to stock occasioned by the failure to construct a fence. It was established by the evidence that this travelled road was from 20 to 60 feet from the railroad track; it was not a regularly laid-out road. We do not think, under the facts of this case, the company was excused from fencing its road. There was space sufficient between the travelled way and the track to have built a fence. The fact that it was a travelled road, and not a pasture, makes the necessity for a fence all the greater.

Railroad along
highway—
Duty to fence.

The final objection urged is that the instructions of the court were erroneous and misleading. After quoting the statute, the court said to the jury: "The foregoing does not apply to any railway or corporation, or the assignee or lessee thereof, whose road is in-

Charge to
jury.

closed with a good and lawful fence, which prevents such animals from being on such road." The criticism is made that the court gave the jury to understand that the road must be inclosed with such a fence as would actually prevent the animals from going upon the track. The language of the statute is: "This act shall not apply to any railroad company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence, to prevent such animals from being on such road." We do not think the words "which prevents," as used in the court's charge, instead of the language of the statute, "to prevent," misled the jury.

An affirmance of the judgment of the district court is recommended.

PER CURIAM.—It is so ordered; all the justices concurring.

56 A. & E. R. Cas.—12

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

v.

FERGUSON.

(Arkansas Supreme Court, Dec. 8, 1892.)

Duty of Railroad Company to Fence Track—Liability for Frightening Animal.—Where a wire fence built by a railroad company along its track was in bad condition, by reason of several gaps in it, and by reason of not being connected with the track at the ends, and a colt strayed upon the right of way inside such fence, and the engineer of an approaching train seeing the colt upon the track, sounded the whistle and frightened the colt, whereupon it ran against the wire fence and was killed, the railroad company was held not liable for the value of the colt, on the ground that the owners of animals in permitting them to run at large assume all the risks to which the animals are exposed.

APPEAL from Hempstead circuit court.

Dodge & Johnson, for appellant.

Jas. H. McCollum, for appellee.

BATTLE, J.—Appellant inclosed a part of its railway track and right of way with a wire fence. For three years the fence was permitted to stand without repairs. The result was, at the end of that time, it was in a very bad condition. There were several gaps in it, and it was not connected with the track at the ends. While it was in this condition the colt of appellee strayed on the right of way of appellant, and upon the part of its railway track so inclosed; and an engineer of an approaching train, discovering it upon the track, sounded the alarm, frightened the colt, and it ran from the track against the wire fence by which its throat was cut, and the colt died from the wound.

Was the appellant liable to the appellee for the loss occasioned by the failure to construct the fence so as to make it harmless to stock, and keep the same in good repair? A well-established rule of law is that the owner of private grounds is under no obligations to keep them in a safe condition for the benefit of trespassers or those who may go upon them uninvited, from motives of private convenience in no way connected with the owner, or from curiosity. He is under no obligation to fence or guard any wells, ditches, stone quarries, or other pitfalls, or dangerous places on his uninclosed grounds, in order to protect animals straying thereon against

**Duty to fence
railroad
track.**

injuries, and is not liable for the damages suffered because he failed to do so. *Hughes v. Railroad Co.*, 66 Mo. 325; *Clary v. Railroad Co.*, 14 Neb. 232, 11 Am. & Eng. R. Cas. 493; *Leseman v. Railroad Co.*, 4 Rich. Law, 413; *Gilman v. Railway Co.*, 62 Iowa, 299, 13 Am. & Eng. R. Cas. 538; 1 Thomp. Neg. pp. 298, 303; 3 Lawson, Rights, Rem. & Pr. §§ 1149, 1151, and cases cited.

In *Railway Co. v. Fairbairn*, 48 Ark. 493, Chief Justice COCKRILL, speaking for the court, said: "The appellee was injured by stepping into a cavity caused by a rotten plank, in the appellant's platform at Bierne station. The jury found the issues in his favor, and the question whether the appellee was lawfully on the platform at the time he was injured is the only one properly left for our consideration. If he was there merely from curiosity, or for his own convenience for the transaction of business in no way connected with the railroad company, no relation existed between him and the company which imposed upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his own use, and it is not liable for his injury."

Is an owner of private grounds under greater obligations to owners of live stock as to such stock? In *Railway Co. v. Kirksey*, 48 Ark. 368, the court said: "The railroad's obligation as a carrier, or its duty to a person rightfully upon its track, are not coincident with the negative duty not to injure, unnecessarily, stock that wanders upon its right of way and track. It is held to a rigid observance of its public duties, but, as to stock straying upon its right of way, its obligation is not different from that of other owners or occupants of real estate. * * * The statute has placed no obligation upon the railroad in that respect, and the rights and liabilities of the company and stock owner are governed by the common law. The company is not required to fence out the stock, and the stock owner enjoys the passive license of free pasturage upon its open premises as upon those of natural persons, without being held to accountability as a trespasser. * * * The technical wrong that the landowner suffers by the entry of another's stock is regarded as too slight to engage the attention of the law,—*damnum absque injuria*. But the privilege of entry and free pasturage is not a right which can be demanded and enforced,—it is only an immunity from suit or punishment; and the company or other landowner is under no obligation to expend money or labor in preparing the land for a convenient or a safe enjoyment of it." And this court, in that case, held that "the duty of railroad companies to avoid unnecessary

injury to stock upon their tracks does not require them to keep their entire right of way clear of obstructions which conceal stock from view of the engineer of the train until they rush upon the track unseen, and too late to avoid the injury."

The law upon this subject, and the reason for it, are clearly and succinctly stated by Chief Justice GIBSON in *Knight v. Abert*, 6 Pa. St. 472. He said: "In this, and perhaps every American, state, an owner of cattle is not liable to an action for their browsing on their neighbor's uninclosed woodland. But it follows not, because such browsing is excusable as a trespass, it is a matter of right. It is an immunity, not a privilege, or, at most, a license revocable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim *de minimis*, or perhaps because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is inappreciable, even as a subject of nominal damages, and would probably be held so even in England, where waste land is altogether worthless. But, even if an owner of cattle had the right claimed for him, the tenant would not be bound to expend his money or his labor in preparing his land for the safe and convenient enjoyment of it. A man must use his property so as not to incommode his neighbor, but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a sand-pit, dig a ditch or a millrace, or open a stone-quarry or a mine-hole, on his own land, except at the risk of being liable for consequential damages from it, which would be a most unreasonable restriction of his enjoyment. He might as well be required to level a precipice, put a fence round a swamp, or cut down reclining trees. It is enough, in all reason, that his neighbor's cattle have the range of his forest, without imposing on him the duty of looking to their safety. If the owner of them does not choose to enjoy his license on that footing, let him keep them at home, or send a herdsman along with them. The law imposes no such duty on the tenant."

Upon the principle stated in the cases we have cited, railroad companies are not required to cover culverts and bridges in their tracks so as to permit stock to pass over them in safety; yet it is a notorious fact, as attested by the records of this court, that cattle frightened by approaching trains

have run into uncovered culverts and been killed; and it never has been suggested by any court, so far as known to us, that a railroad company was liable for such injuries because the culverts were uncovered. *Railroad Co. v. Newman*, 36 Ark. 607; *Railway Co. v. Trotter*, 37 Ark. 593, 11 Am. & Eng. R. Cas. 475.

There is, however, a class of authorities which holds, by way of exception to the general rule, that it is the duty of the owners of private grounds to erect suitable guards around the excavations made by them thereon, so near a public road that persons and animals passing on the road might accidentally fall into the same, and that they are liable to any one who may be injured by accidents resulting from their failure to do so. *Clary v. Railroad Co.*, 14 Neb. 232, 11 Am. & Eng. R. Cas. 493, and cases cited: 3 *Lawson, Rights, Rem. & Pr.*, § 1157, and cases cited; 1 *Thomp. Neg.*, p. 307. In *Townsend v. Wathen*, 9 East, 277, A. kept on his open grounds near the highway, without notice, certain traps baited with flesh, for the purpose of catching his neighbor's dogs, and B.'s dog, led by his natural instinct, ran into one of these traps and was killed, and it was held that A. was liable to B. for the damages caused by the killing of the dog. And in a case in which the defendant had dug a pit under a cotton-gin, near a highway, and kept it uninclosed, with corn and cotton-seed scattered about it, and the plaintiff's cow, which he had turned out at a place remote from the gin, fell into it and was killed, this court held that the defendant was guilty of negligence, and liable to the plaintiff for the value of the cow. *Jones v. Nichols*, 46 Ark. 207.

In this case the appellant was under no obligation to construct and maintain a fence along its track or highway, or to place guards around wells or other pitfalls or dangerous agencies on its right of way, to protect animals, uninvited, wandering thereon against injuries. It was under no greater obligations to provide safeguards against wire fences than it was to place them around pits or other dangerous places. The peculiarity of the danger does not alter the duty or liability. The owner of animals, in permitting them to run at large, assumes all the risks to which the animals are exposed by reason of such dangers.

In the trial of this case no evidence was adduced tending to show that the appellant placed anything on its right of way calculated to invite or induce horses and cattle to go thereon, between its track and the wire fence, and that appellee's colt was thereby invited or induced by appellant to go upon the same at the time it was killed, as in the case of

Defective
fence—Liability of company.

Sisk v. Crump, 112 Ind. 504, cited by appellee. There was no evidence tending to show that the wire fence was constructed or maintained in such manner and so near a public street or road as to make it dangerous for horses or cattle passing along the street or road. There was no evidence to show that this case comes within any exception to the general rule. The evidence tended to prove, in short, the following facts: That the wire fence was in bad condition by reason of the gaps in it; that appellee's colt, uninvited, wandered upon the right of way and track of appellant, was frightened by an alarm lawfully given on a passing train, and ran against the fence, and was thereby wounded and killed. The case comes clearly within the general rule, as we have stated it.

But appellant did owe to appellee the duty, when it discovered his colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against the wire fence. *Railway Co. v. Roberts* (Ark.), 19 S. W. Rep. 1055; *Railroad Co. v. Hudson*, 62 Ga. 679.

Reversed, and remanded for a new trial.

Negligence of Employees in Frightening Animals.—In *Lynch v. Northern Pacific R. Co.*, 84 Wis. 848, it was held that fright could not be regarded as the proximate cause of injury, where a horse jumped the cattle-guard at a railroad track, upon being frightened by a train, and ran along the right of way until it became entangled in a bridge and was injured.

Liability of Railroad Companies for Injuries to Animals not Resulting from Contact with Train.—See note, 19 Am. & Eng. R. Cas. 610; note, 15 Am. & Eng. R. Cas. 526; note, 49 Am. & Eng. R. Cas. 526.

In *Cobb v. Columbia & G. R. Co.*, 37 S. Car. 194, it was held that a railroad company was liable for injury to a horse which had been made to run away by reason of the conduct of the engineer in unnecessarily, maliciously, and recklessly sounding the whistle, but not for the conduct of the trainman in shouting at the horse.

MISSOURI PACIFIC R. Co.

v.

GILL.

(99 *Kansas*, 441.)

Stock-killing Act—Demand for Damages before Beginning Suit.—In an action under paragraph 1252 of the General Statutes of 1889, for injuries to stock, where there was evidence tending to show that there was both a verbal and written demand, but the trial court rejects the copy of the no-

tice of the written demand upon the ground that it was not the best evidence, and the jury found that there was both a written and verbal demand, *held*, that the finding that there was a written demand was immaterial, and that a new trial should not be granted for that reason.

Liability of Railroad Company under the Statute for Frightening Animals.—The plaintiff's mare was pasturing on the defendant's right of way, at a place where it ought to have been, but was not, inclosed. She was frightened by the sounding of a whistle upon an engine drawing a train of cars, and ran along by the side of the track on the right of way into a barbed-wire fence running at right angles with the railroad, and was injured. *Held*, that the defendant was liable, under the statute.

COMMISSIONER'S decision. Error to Osage district court.
Waggener, Martin & Orr, for plaintiff in error.
J. W. Lord, for defendant in error.

GREEN, C.—This was an action brought by T. M. Gill against the Missouri Pacific Railway Company to recover damages for injuries to a mare owned by the former on October 20, 1886. The plaintiff alleged the failure of the railway company to fence its railroad, and also negligence upon the part of the company in sounding the whistle, by reason of which the mare of the plaintiff became frightened, and ran against a barbed-wire fence and was injured. It seems from the evidence that the mare, with four other horses, was grazing north of the railroad track, in a pasture which lies principally on the south side of the right of way, but also extends a short distance north of it, leaving only a narrow strip between the railroad and the fence on the north side of the pasture. There was a young hedge inclosing the pasture, with a barbed-wire fence on the inside of it, and, when the railroad was constructed through the north side of the pasture, the company made a barbed-wire fence from the northeast corner of the pasture south to the track. The strip north of the track was in blue grass, and as the horses were grazing there, near the track, a construction train approached from the west, and the engineer sounded the whistle, the first blast of which scared the animals, and they all ran eastwardly, the mare in the lead, broke through the barbed-wire fence forming the east line of the pasture north of the track, and were thereby injured. The case was first tried before a justice of the peace, and then appealed to the district court, and each time resulted in a judgment for the plaintiff. In the district court the plaintiff recovered a verdict for \$100 damages, and \$35 attorneys' fees. The railroad company brings the case here, and insists that there is neither common-law nor statutory liability. Case stated.

The verdict and judgment of the district court are based upon the theory that there was a statutory liability, and it is

unnecessary for us to discuss this question of the common-law liability, if the judgment can be upheld upon the theory upon which the case was tried and determined. The first claim made is that there was no legal demand made upon the railroad company 30 days before the suit was brought. The plaintiff below commenced his suit on the 22d day of March, 1888. He testified that he served notice on the agent of the company on the 9th day of January, 1888. It is true that, when he offered a copy of the demand in evidence, it was rejected, because it was not the best evidence. He had without objection testified that he had given the company a written notice, and afterwards testified that he made an oral demand for his damages upon the ticket agent. The jury, in answering the special questions, found that the plaintiff had made a demand in writing, as well as an oral or verbal demand. It is now insisted by the plaintiff in error that because the court excluded the copy of the written demand, because it was not the best evidence, the answers of the jury to the special questions in regard to the demand were contradictory, and the court should for that reason have granted a new trial. There was evidence that the plaintiff made both a written and verbal demand upon the agent of the railroad company more than 30 days before the commencement of the action. The jury having found that a demand had been made, it is immaterial whether it was in writing or not. Either is sufficient. *Railroad Co. v. Butman*, 22 Kan. 640.

It is further argued that the essential facts do not justify a recovery in this case; that the animal was not injured in operating the railroad, and as a direct result of such operation. The jury found that the mare was grazing in the pasture on the railroad company's right of way, and that she was injured several feet north of the track, by running into a barbed-wire fence which ran at right angles with the railroad from a culvert to the fence on the north side of the pasture. While the precise question has never been passed upon by this court, it has been held, in the case of *Railroad Co. v. Jones*, 20 Kan. 527, that where an animal got on to the railroad track at a place where it should have been, but was not, fenced, and was frightened by an approaching train, and fled along the track until a bridge was reached, and was either thrown forward or jumped onto the bridge, and fell between the ties, and was thus fatally injured, the railroad company was liable under the statute. In delivering the opinion of the court, Judge BREWER said: "Again, the liability is not limited to cases where the animal is killed or wounded by the

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Statutory
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'engine or cars,'—which might perhaps be construed as referring solely to actual collision,—but extends to those cases where the animal is injured 'in any other manner whatever in operating such railway.' This last clause is very broad, and clearly covers a case like the present. Whether the engine struck the mare or not, the injury resulted directly from the operating of the railway. Of course, the mere fact that she was injured on the track would not be conclusive. An injury might happen from the act of strangers, or the wanton acts of employes of the road, outside of the scope of their employment. If a brakeman, seeing a mare on the track, had drawn his revolver and shot her in mere wantonness, the company would not be liable. Such act might be done while operating the railway, but not in operating it. It is like any other wanton and wilful act of employes outside the scope of their employment, casting no liability on any one but themselves. But when the injury occurs in the actual operating of the railway, and as the direct result of such operating, then the statute applies. Here the company was running one of its trains. An animal is on the track, permitted to come on through the lack of a fence along the track at a place where it ought to be fenced. The approaching train frightens it, it flees along the track to avoid the danger, and in that flight either falls or is thrown by the engine into the open spaces of a tie bridge, and is injured. Clearly, the train, acting upon the animal's sense of fear, and the open space of the bridge, are the direct causes of the injury. It results from and occurs in the operating of the railroad."

In this case, instead of being on the track, the mare was on the right of way, became frightened by the sound of the whistle, ran along the right of way, by the side of the track, into the barbed-wire fence. We think, upon the authority of the above case, the company is liable, and the judgment of the district court should be affirmed.

PER CURIAM.—It is so ordered; all the justices concurring.

Action for Damages after Demanding Value of Stock Killed.—In *St. Louis & S. F. R. Co. v. Kinman*, 49 Kan. 627, it was held that an owner of stock can maintain an action, under the Act of 1874 (Gen. St. 1889, pars. 1251-1256), against a railroad company for injuring his stock, only after a demand for payment for such injury has been made upon some ticket-agent, station-agent, or upon some other agent of the railroad company having authority to collect or settle claims for such injuries.

In *Union Pacific R. Co. v. Shelley*, 49 Kan. 667, it was held that, in a statutory action to recover the value of two horses killed by a railway company in the operation of its trains, a demand is sufficient where it is established that the plaintiff goes to a station-agent of the company 30 days before suit is brought and informs such agent that he wants to make

a demand for the horses killed, gives a description of them, and states that they were worth \$300, and the agent takes the demand down and says "All right," and it further appears that such demand was transmitted to the claim-agent of the company and a settlement attempted.

ILLINOIS CENTRAL R. CO.

v.

NOBLE.

(*Illinois Supreme Court, Nov. 2, 1892.*)

Cattle on Right of Way—Duty of Railroad Employees to Keep Lookout.—A railroad company has a right to an unobstructed use of its track, and where its fences are in proper condition its employes are not bound to anticipate the presence of cattle trespassing upon its tracks, nor maintain an especial vigilance in looking for them, until in some way notified that they are in fact, or are likely to be, on the track.

APPEAL from appellate court, third district.

Williams & Capen, for appellant.

Stevenson & Ewing and *John F. Wight*, for appellee.

BAILEY, C.J.—This was an action on the case, brought by John T. Noble, against the Illinois Central Railroad Company, to recover the value of certain horses of the plaintiff, killed on the defendant's railroad by one of its engines. The first count of the declaration, upon which alone the case seems to have been tried, alleges, in substance, that on and before August 1, 1890, the defendant was a railroad corporation, and was possessed of and using and operating a certain railroad extending through the county of McLean, and that five horses of the plaintiff then and there strayed and went upon the defendant's said railroad, and, said horses being then and there on said railroad, a certain engine of the defendant was then and there so carelessly, negligently, and improperly run, conducted, and directed by divers agents of the defendant, that said engine run upon and struck said horses with great force and violence, and thereby then and there killed said horses of the plaintiff, each of the value of \$200. The defendant pleaded not guilty, and the trial, which was had before the court and a jury, resulted in a verdict finding the defendant guilty, and assessing the plaintiff's damages at \$550, and for that sum and costs the plaintiff had judgment. On appeal to the appellate court said judgment was affirmed, and the record is now brought to this court by

appeal from said judgment of affirmance, the judges of that court having granted the necessary certificate of importance.

It appears that the plaintiff, at the time the horses were killed, was the owner of a tract of land in McLean county, through which the defendant's railroad runs, and the plaintiff has a private farm crossing over said railroad, with gates on either side. No claim is made of any negligence on part of the defendant in the matter of properly fencing its right of way, or of constructing and maintaining the gates at said farm-crossing. On the night of August 1, 1890, five of the plaintiff's horses got onto the defendant's right of way, and were struck by one of the defendant's locomotive engines, propelling one of its freight trains, and were all killed. The evidence renders it probable that said horses got onto the right of way by passing through one of said gates, but there is no evidence tending to show by whose fault the gate was opened, nor what care, if any, had been taken by the plaintiff to prevent his horses from getting upon the railroad. It seems, however, to have been conceded at the trial that the gate was not left open through the fault of the defendant, as the plaintiff's counsel expressly declared in open court that he was not seeking to recover because the gate was left open. The night seems to have been a moonlight night, and the negligence on the part of the employes in charge of the engine, upon which the plaintiff bases his right to recover, consists of their failure to exercise proper diligence in discovering that the horses were on the track in time to so check the speed of the train as to prevent a collision. The testimony of the employes in charge of the train tends to show that they did not and could not see the horses until so near them that a collision could not be avoided; the testimony of the engineer being to the effect that the horses stepped onto the track only a few feet in front of the engine, and that he then did everything in his power to avoid colliding with them. Other witnesses, however, testified as to the appearance of the tracks of horses as seen on the railroad track after the collision, from which the inference is sought to be drawn that the horses went upon the track at such a distance in front of the engine that the engineer, in the exercise of ordinary care, might have discovered them in time to prevent the accident.

The court thereupon, at the instance of the plaintiff, gave to the jury the following instruction: "The court instructs the jury that, in determining the question of the liability of the railroad company in this case, you have a right to take into consideration the character and circumstances of the injury, as shown by the evidence, and in weighing the testimony you should

"Reason-
able" care—
Scope of term.

consider all the evidence together, and give to the testimony of every witness whatever weight in your judgment it deserves; and if, from all the evidence, and from all the circumstances shown by the evidence, you believe that by the exercise of reasonable care and caution the horses could have been seen by the employes of the defendant in charge of said train, after said horses were on the track of defendant's railroad, in time to have stopped said train, or to have reduced its speed so as not to have injured said horses, by the exercise of reasonable diligence, then it was the duty of said employes to have done so, and, if they did not, then the defendant is liable for such negligence, and the plaintiff is entitled to recover whatever the jury may believe from the evidence said horses were worth." The following instruction, asked on behalf of the defendant, was modified by the assertion of the words in italics, and was given as modified: "Unless the plaintiff has proved, by a preponderance of the evidence, that after the horses were, *or by the exercise of reasonable care could have been,* seen approaching the track, *or on the track,* the trainmen might, by the exercise of ordinary care, have prevented the train from striking the horses, you should find the defendant not guilty."

A minor criticism of these instructions is that they use the word "reasonable" as indicating the degree of care and caution which the law made it the duty of the defendant's employes to exercise, for the purpose of discovering the horses on the railroad track, or approaching thereto. Unless the word "reasonable" is to be understood as the equivalent of "ordinary," we should be disposed to think the objection well taken. If not used in that sense, the word "reasonable" would have had no fixed meaning, and would have authorized the jury to apply to the conduct of the defendant's employes any rule as to the care and caution they might have deemed reasonable. In that case the effect of the instruction would have been to submit to the jury the determination of a rule of law. But we think "reasonable care" is to be understood, and must have been understood by the jury, as meaning "ordinary care," and that said instructions are to be treated as though the latter phrase had been employed. *Read v. Morse*, 34 Wis. 315; *Kellogg v. Railway Co.*, 26 Wis. 223.

The question, then, is whether, under the facts which the evidence in the case tends to prove, the defendant's servants were bound to exercise ordinary care and caution to see said horses, and discover their presence on defendant's right of way. The evidence undoubtedly tends to prove that the plaintiff's horses, at the time they were killed, were on the defendant's railroad track wholly without right, and were in fact

mere trespassers. Indeed there seems to be no substantial dispute that such was the case. The defendant is shown to have performed its entire statutory duty in respect to erecting and maintaining fences on the sides of its road, with gates at the plaintiff's farm-crossing, and no negligence on the part of the defendant in those respects is insisted upon. While it is probable that the horses got onto the railroad through one of said gates, it is not claimed that such gate was left open through the defendant's negligence, and the plaintiff's counsel, as we have seen, expressly disclaimed any right to recover on the ground of any negligence in leaving said gate open. The defendant, having performed its entire legal duty in the matter of fencing its road, was entitled to the enjoyment of its right of way, free from the incursion of the domestic animals of adjoining proprietors; and such animals, in getting through said fence onto the right of way, were wrongfully there, and were trespassers.

The evidence also tends to show, and on this point there seems in like manner to be no substantial controversy, that the defendant's employes, in charge of its train, had no actual knowledge or notice of the presence of the plaintiff's horses on the defendant's right of way until the engineer saw them as they were on the track, or just stepping onto the track, the instant before they were struck by the engine. Nor is there any evidence tending to show that said employes had any notice or intimation that the horses were likely to be trespassing upon the defendant's right of way. The controversy, so far as the facts are concerned, is whether said employes, if they had been in the exercise of ordinary care and caution to discover possible trespassers on said right of way, would have discovered said horses in time to avoid injuring them. What duty, then, as to care and caution, so far as it relates to the mere discovery of the fact that domestic animals are trespassing on a railroad track, does the railroad company and its employes owe to the owners of such animals? It is scarcely necessary to observe that this is entirely apart from any inquiry as to the duty as to care and caution which a railroad company and its employes owe to its passengers or to the owners of property in course of transportation, nor does it involve the same rules which apply after the presence of the trespassing animals has been discovered or is known. The railroad company has a right to an unobstructed use of its track, and it is justified in presuming, and in acting upon the presumption, until the contrary is brought to its attention, that its right in this respect will not be interfered with.

We are not prepared to hold that the duty of a railroad

Duty of railroad employes to keep lookout for cattle on track.

company to mere trespassers or to the owners of trespassing animals requires such company to run its trains with a view to the constant probability of trespassers upon its track. Precaution is a duty only so far as there is a reason for apprehension, and no one can complain of want of care in another where such care is rendered necessary only by his own wrongful act. *Railroad Co. v. Hammell*, 44 Pa. St. 375; 1 *Thomp. Neg.* 448. In *Railway Co. v. Barlow*, 71 Ill. 640, which was a suit against a railroad company to recover the value of a cow killed by a passing train, we said: "The rule of liability in such a case as the present, where an animal is unlawfully upon a railroad track, we conceive to be that the company is not, in general, liable, unless its servants, after they discovered that the animal was in danger, might, by the exercise of proper care and prudence, have prevented the injury; that it is not sufficient, in such case, to charge the company, to show that they were running at a high rate of speed, or without proper care in other respects;" and there being no evidence that the employes in charge of the engine, after discovering the peril of the animal, might, by the exercise of proper care and prudence, have prevented the injury, a judgment in favor of the plaintiff for the value of the cow was reversed. In *Railroad Co. v. Godfrey*, 71 Ill. 500, suit was brought to recover damages for an injury to the person of the plaintiff, who at the time he was injured was a trespasser upon the defendant's railroad track, and it was held that only for wanton or wilful injury could the defendant be held chargeable. We there said: "Notwithstanding the plaintiff was unlawfully upon defendant's right of way, or not in the exercise of a legal right, and that his own lack of ordinary care exposed him to the risk of injury, yet the defendant might not, with impunity, wantonly or wilfully injure him; and if defendant's servants, who were in the management of the engine, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him, the defendant might be liable; and this, as we conceive, is the only measure of liability to be claimed under the facts of this case."

The doctrine announced in these decisions, that where the persons or animals exposed to injury are mere trespassers, the duty to exercise care arises only upon discovery of their presence on the railway, seems to be strictly in accordance with the general current of authority. Thus, Mr. Redfield, in discussing the liability of railway companies for injuries to domestic animals, says: "Where the owner of the animals is unable to show that, as against the railway, they were properly upon its track, or, in other words, that it is through the fault of the company that they were enabled to come upon the road,

the company are not in general liable, unless after they discovered the animals, they might, by the exercise of proper care and prudence, have prevented the injury." And again: "It has been held not to be sufficient in such cases to charge the company to show that they were running at an unreasonable speed, or without proper care in other respects. The only question in such case is, we apprehend, whether the company, after discovering the peril of the animals, might have so conducted as to have prevented the injury." 1 Redf. R. R. (6th ed.), § 126. In a note to *McAllister v. Railway Co.* (Iowa), 19 Am. & Eng. R. Cas. 108, many authorities involving a discussion of the rule now under consideration are collected, in most of which, however, said rule is applied to persons trespassing on a railway track; the doctrine sustained by said authorities being that "a railroad company is not bound to keep a lookout for trespassers walking upon the track. When such parties are injured by a passing train, they have only themselves to blame, and cannot recover, unless the servants of the company have been negligent, after becoming aware of the trespasser's perilous position." We see no reason why the duty of care and vigilance should not be the same whether the trespasser is a human being or a domestic animal. At least the duty to be on the lookout for the latter can be no greater than for the former.

But it is contended that former decisions of this court have established a different rule. The case involving this point to which our attention is principally directed is that of *Railroad Co. v. Middlesworth*, 46 Ill. 494, and it must be admitted that portions of the opinion in that case lend countenance to such contention. It is apparent, however, that the question now under consideration was not of controlling importance in that case, as the proof showed that the engineer in charge of the engine, as a matter of fact, saw the mules which were killed a sufficient time before reaching them to have been able, by the exercise of ordinary care, to stop his train, and thus avoid colliding with them. So far as the rule there announced imposed upon railroads the duty to anticipate the presence of trespassers, and to be in constant exercise of vigilance to discover them, so as to make the breach of that duty a ground for recovery for the trespasser, said decision is not in harmony with the general current of authority, nor with what has been said by this court in its more recent decisions. Doubtless, where the view is unobstructed, so that if the engineer is at his post, and in the proper discharge of his duties, the trespassing animals must be within the range of his vision, the presumption will readily and perhaps necessarily arise that he does see them, and his subsequent con-

duct, as to being negligent or otherwise, will be judged of upon that basis. But it cannot be said that he is bound to anticipate the presence of trespassing animals on the track, or to be under any duty of special vigilance in relation to them until he is in some way notified that they are in fact, or are likely to be, on the track.

We are referred to several later decisions of this court in which the *Middlesworth Case* is referred to with approval, but in none of them does the precise question here involved seem to have been presented. We are of the opinion that the instruction in this case, so far as it imposed upon the servants of the defendant in charge of its train the duty of care and caution to discover the presence of trespassing animals, of which they knew nothing, upon the track, was erroneous, and for that error the judgment will be reversed, and the cause will be remanded to the circuit court for a new trial.

Judgment reversed.

Duty of Railroad Company to Keep Lookout for Animals on its Right of Way.—The weight of authority is in favor of the proposition that the servants of a railroad company are bound to use ordinary precaution to discover the presence of cattle on the track, as well as to avoid injuring them when they are discovered; and if they fail in this duty, the company is liable for their negligence. *Washington v. Baltimore, etc.*, R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 749; *Blaine v. Baltimore, etc.*, R. Co., 9 W. Va. 252; *Kerwhacker v. Cleveland, etc.*, R. Co., 3 Ohio St. 172; *Cleveland, etc.*, R. Co., etc., *v. Elliott*, 4 Ohio St. 474; *Trowe v. Vermont Central R. Co.*, 21 Vt. 487; *Johnes v. North Carolina, etc.*, R. Co., 70 N. Car. 626; *Cincinnati, etc.*, R. Co. *v. Smith*, 22 Ohio St. 244; *Baylor v. Baltimore, etc.*, R. Co., 9 W. Va. 271; *Louisville, etc.*, R. Co. *v. Wainscott*, 8 Bush (Ky.), 109; *Kendig v. Chicago, etc.*, R. Co., 79 Mo. 207, 19 Am. & Eng. R. Cas. 493; *Carlton v. Wilmington, etc.*, R. Co., 104 N. Car. 365; 40 Am. & Eng. R. Cas. 178; *Kansas City, etc.*, R. Co. *v. Watson*, 91 Ala. 483; *East Tennessee, etc.*, R. Co. *v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; *East Tennessee, etc.*, R. Co. *v. Watson*, 90 Ala. 41; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Alabama, etc.*, R. Co. *v. Jones*, 56 Ala. 507; *East Tennessee, etc.*, R. Co. *v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596; *East Tennessee, etc.*, R. Co. *v. Bayliss*, 77 Ala. 429; *Toledo, etc.*, R. Co. *v. Ingraham*, 58 Ill. 120; note, 40 Am. & Eng. R. Cas. 176.

The Supreme Court of Kansas, speaking through *Horton, C.J.*, says: "If the employes of the railroad company could, by the use of ordinary prudence, see, or seeing the stock on the track could, without danger, stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted which by the use of ordinary care and diligence may be avoided." *Missouri Pacific R. Co. v. Wilson*, 28 Kan. 637, 11 Am. & Eng. R. Cas. 447. (Citing *Railroad Co. v. Caffman*, 38 Ill. 425; *Railroad Co. v. Lewis*, 58 Ill. 49; *Railroad Co. v. Phillippi*, 20 Kan. 9; *Railroad Co. v. Rice*, 10 Kan. 426.) This opinion was quoted and approved in *Missouri Pacific R. Co. v. Gedney*, 44 Kan. 329, where it was held that it is not enough for the engineer and fireman to use diligence in driving away animals that are discovered on the track, but that they should keep a "vigilant lookout and exercise ordinary dili-

gence" to discover and frighten away animals that are dangerously near the track. To the same purpose, see *Carlton v. Wilmington, etc.*, R. Co., 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; *Wilson v. Norfolk, etc.*, R. Co., 90 N. Car. 69, 19 Am. & Eng. R. Cas. 453. "A watchful lookout must be steadily maintained for the discovery of obstructions on the track; and it is no excuse for the railroad that the obstruction was not discovered, if by prudent watchfulness it could have been discovered. Failure to maintain a steady lookout is itself culpable negligence," but "infallibility is not attainable, and the impossible need not be attempted." *Mobile, etc.*, R. Co. v. *Caldwell*, 83 Ala. 196. In other cases it is held that the engineer is not required to keep his eye steadily on the track before him to the neglect of his other equally imperative duties. *East Tennessee, etc.*, R. Co. v. *Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596; *Howard v. Louisville, etc.*, R. Co., 67 Miss. 347; *Louisville, etc.*, R. Co. v. *Ballard*, 2 Metc. (Mass.), 177. A Tennessee statute requires all railroad companies "to keep the engineer, fireman, or some one else, always on the lookout ahead when the train is in motion," and, while the statute has been construed and enforced with great strictness, it has been held that it was sufficient for the railroad company to prove that the statutory precaution was being observed at the time of the accident, and that no recovery could be had for failure to keep the lookout over the whole length of the road. *Louisville, etc.*, R. Co. v. *Stone*, 7 Heisk. (Tenn.), 468.

Even where animals are wrongfully upon the track, through the neglect of the owner, the railroad company may be liable for injury to such animals by reason of the negligence of the engineer in failing to keep a proper lookout. *Bemis v. Connecticut, etc.*, R. Co., 42 Vt. 375. See, also, *Illinois Central R. Co. v. Middlesworth*, 46 Ill. 494, overruling *Central Military Tract R. Co. v. Rockfellow*, 17 Ill. 541, and declaring that the company was liable for injury on account of failure to keep a lookout, although the trespassing stock had broken through the railroad fence. See, *contra*, *Stacy v. Winona, etc.*, R. Co., 42 Minn. 158, 40 Am. & Eng. R. Cas. 217, where it was held that the employes were not bound to anticipate the presence of cattle on the track where the right of way was properly fenced.

In Arkansas, railroad companies are not required to keep a lookout for cattle on the track, on the ground that the cattle are trespassers. *Memphis, etc.*, R. Co. v. *Kerr*, 52 Ark. 162, 40 Am. & Eng. R. Cas. 171; *Kansas City, etc.*, R. Co. v. *Kirksey*, 48 Ark. 366; *Kansas City, etc.*, R. Co. v. *Shaver* (Ark.), 14 S. W. Rep. 864.

In Ohio, etc., *R. Co. v. Clutter*, 82 Ill. 123, it is held that it is negligence for a railroad company to permit weeds or grass to grow on its grounds, so as to obstruct the view of the engineer, and that the company is liable for damages to stock resulting from such negligence. See, also, *Indianapolis, etc.*, R. Co. v. *Smith*, 78 Ill. 112. But the opposite doctrine is held by the Arkansas courts. See *Kansas City, etc.*, R. Co. v. *Kirksey*, 48 Ark. 366.

In any case, the question whether or not the railroad employes have been guilty of negligence in not keeping a proper lookout is for the jury to determine. *Carlton v. Wilmington, etc.*, R. Co., 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; *Mobile, etc.*, R. Co. v. *Caldwell*, 83 Ala. 196; *Kent v. New Orleans, etc.*, R. Co., 67 Miss. 608.

In *Louisville & N. R. Co. v. Posey* (Ala., June 27, 1892.), 11 So. Rep. 423, it was held, under the code providing that a railroad engineer "must *** on perceiving any obstruction on the track, use all the means within his power, known to skilful engineers, such as applying brakes and reversing engine, in order to stop the train;" that the duty to take precautions against inflicting injuries upon live-stock arises not only when the engineer

of a moving train sees an animal on the track, or in dangerous proximity thereto, but also when, by the exercise of due diligence, he might have seen it, and that a failure in either of these respects is negligence.

In *Birmingham Mineral R. Co. v. Harris*, (Ala., June 17, 1893.), 18 So. Rep. 377, in an action against a railroad company for injury to stock, it was held proper to charge the jury "that after it was shown the plaintiff's mules were killed on defendant's railroad by a moving train, the burden of proof was on the defendant to show what it was not negligent in respect to a lookout."

In *Birmingham Mineral R. Co. v. Harris* (Ala., June 17, 1893.), 18 So. Rep. 377, it was held in an action against a railroad company for damage to stock that it was improper for counsel to ask the question "Did you see the mules as soon as the light of the engine permitted you to see them?" because it ignored the maintenance of a proper lookout.

In *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, it was held that it was the duty of an engineer of a railroad train to keep a lookout for stock upon the track. See *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. Rep. 347; *Railway Co. v. Johnson*, 54 Fed. Rep. 474.

In *Lighthouse v. Chicago, M. & St. P. R. Co.*, (S. Dak., Feb. 15, 1893.), 54 N. W. Rep. 320, it was held, in an action for killing stock trespassing upon defendant's right of way, that the jury was not obliged to accept as conclusive the positive evidence of the engineer that, although he was looking forward along the track, he did not see such stock until within 25 or 30 feet of them, if they believe from other evidence that at the time of the accident it was so light as to render such statement improbable.

And see generally as to the obligation of railroad employes to keep a lookout for animals upon the track, *Memphis & L. R. Co. v. Kerr* (Ark.) 40 Am. & Eng. Corp. Cas. 171, note, 173, 176; *Missouri Pac. R. Co. v. Gedney* (Kan.), 45 Am. & Eng. Corp. Cas. 492, note 495; Note 49 Am. & Eng. R. Cas. 549; *McMaster v. Montana Union R. Co.* (Mont.) 49 Id. 564.

Care Required of Railroad Company to Avoid Accident.—In *East Tennessee, V. & G. R. Co. v. Daniel*, (Ga., July 10, 1893.), 18 S. E. Rep. 22, it was held that a charge of the court which might be understood by the jury as requiring of a railroad company all possible care to avoid killing live-stock by the running of its trains, although the charge be, in other parts of it, correct, on the measure of diligence required of such companies, is cause for a new trial, in a very doubtful case.

"Reckless" Running of Train—Term Construed.—In *Louisville & N. R. Co. v. Barker*, (Ala., July 27, 1892.), 11 So. Rep. 453, it was held, in an action against a railroad company for the killing of stock, that the word "reckless," as used in the complaint, implied no more than a want of that degree of care which the law required of the defendant's employes in the operation of a train which killed the cattle.

McMASTER

v.

MONTANA UNION R. Co.(12 *Montana*, 163.)

Killing Live-stock—Negligence in Maintaining Defective Fences—Variance between Complaint and Evidence.—In an action against a railroad company to recover damages for the alleged killing of animals, the complaint charged negligent and careless conduct on the part of the railroad employes, and the answer admitted the killing, but denied negligence and charged contributory negligence. The complaint contained no reference to the railroad fences. On the trial evidence was introduced in reference to the fences along the track, and without objection by either party. There was no law requiring the defendant to fence its right of way, and the plaintiff did not contend that it was the duty of the defendant to keep its right of way inclosed so as to prevent stock from going on the track, but the defendant had alleged in its answer that "such killing and destroying was the result of plaintiff's own carelessness contributing thereto, for which this defendant was in no wise responsible," this allegation being denied in the plaintiff's reply. Neither party made any explanation of the bearings of this evidence on the pleadings. The defendant relied to some extent upon the fact of having constructed the fence inclosing its right of way as evidence of due care in the attempt to keep stock from going on its track. As against this evidence, the plaintiff introduced testimony to show the condition of certain gateways in the said fence, through which the animals had strayed upon the track. *Held*, that it could not reasonably be contended that there was no foundation laid in the pleadings for the introduction of such evidence, since it might have been justified under the allegation and denial of contributory negligence.

Same—Special Findings of the Jury.—The evidence introduced as above stated tended to show the jury that when the animals came to the gateways in the said fence they could freely pass in and along the right of way where the fence was close to the track, so that they could not retreat into the open field upon the approach of a train. The gates were subject to the defendant's control, and after the killing of the stock the defendant made and enforced a rule to the effect that, if the said gates were not kept closed and locked by those who used them, the railroad company would nail them up. The conditions were favorable for the construction of cattle-guards which would obviate the necessity of any gates at all. It was shown to the jury that the fence with the said gates might be less safe than no fence at all, and that the defendant's employes knew that the gates were open. *Held*, that a special finding of the jury that the defendant was negligent in not keeping the said gates closed and locked was not unreasonable or groundless in its premise.

Condition of Weather at Time of Accident—Duty of Engineer.—In this case the jury found that the engineer of the appellant's train was negligent in that he made no effort to stop the train before striking the animals. The appellant claimed that the evidence showed that at the time and place of the killing the animals the condition of the weather and darkness was such that the employes could not, by the exercise of ordinary care, have

seen the stock on the right of way in time to avoid the accident. The testimony as to the condition of the weather at the time of the accident was conflicting, but it was shown that if the weather was clear the exercise of ordinary care would have revealed the presence of the animals in time to avert their destruction. The court charged the jury that it was the "duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; and if he failed to see an animal when he should, and thereby injures it, or if seeing it he does not use the appliances at his command to avoid injuring it, then the company is liable, unless it appears from the circumstances surrounding the case that the use of these means to stop the train would injure the lives of the passengers." *Held*, that the verdict of the jury would not be disturbed, and that the instruction to the jury was correct.

Contributory Negligence—Grazing on Public Domain.—The fact that the owner of a ranch in Montana turns his horses out to graze on the public domain in the vicinity of his ranch does not make him guilty of contributory negligence, so as to prevent recovery for the value of the horses when they are killed by a passing train.

DE WITT J., *dissenting*.

APPEAL from Deer Lodge district court.

J. S. Shropshire, for appellant.

Theodore Brantley and W. H. Trippet, for respondent.

HARWOOD, J.—Action to recover damages, for the alleged killing of four head of horses by the negligent and careless running of an engine and cars against and over them by defendant's agents and servants, in the operation of its railroad. Defendant answered plaintiff's complaint, not denying the killing of said animals, as alleged, by the running of defendant's engine and cars against and upon them, but denying that the injury happened through the negligent or careless conduct of defendant or its agents or employes in the operation of its railroad. And for a further defence defendant alleged that such injury happened through plaintiff's own carelessness, which contributed thereto. Upon these two points of issue, as we are informed by appellant's brief, the cause was tried. The jury returned their verdict in favor of plaintiff, assessing damages in the sum of \$700. Defendant moved for a new trial, which motion was overruled, and appeal was taken.

The main proposition to be considered upon this appeal is whether or not the verdict is supported by sufficient evidence. Appellant contends that it appears from the evidence that the killing of said animals happened through unavoidable accident, without negligence on the part of appellant; or, as appellant's counsel states the proposition, "if defendant was in the exercise of ordinary care, and the killing of the animals resulted notwithstanding, then there is no liability;" and appellant contends that the evidence shows the state of

facts involved in this premise. On the other hand, respondent insists that the verdict is supported by the evidence, which he asserts shows negligence and carelessness attending the killing of the animals in question, and that respondent in no way contributed thereto. It appears that the killing of said animals happened near a place called "Kohr's Siding," on the line of defendant's railroad, in Deer Lodge county. Plaintiff resides about five miles distant from that place. The horses in question were turned out by plaintiff to graze upon the commons in the vicinity of his ranch; and between 2 and 4 o'clock on the morning of September 24, 1890, they were killed at the point aforesaid, by being struck by an engine and train of cars running over defendant's railroad. It appears to be conceded that said stock went upon defendant's railroad track without the fault or negligence of the plaintiff (leaving out of consideration now the point made by appellant that the turning of said stock loose upon the commons amounted to contributory negligence on the part of plaintiff). The evidence shows that the railroad company had inclosed its right of way at the place in question by a fence; but it is also shown that at said place the lines of said fence were severed by gateways, and the evidence seems to be quite conclusive that such gates were broken down, and lying on the ground, or at least open so as to admit of stock passing freely through the fence upon said railroad track at the time in question. Appellant insists that such gates were opened or broken down by others than its agents, and without its knowledge or permission; but it is not contended that plaintiff was in any way guilty of opening said gates, or carelessly leaving the same open. The testimony of plaintiff's witnesses tends to show that said gateways were, and had been for some time prior to the killing of said animals, left open.

The testimony of defendant's section foreman is to the effect that for some time prior to the killing of said animals said gates were found open almost every morning, and were often closed by the section men of defendant; and that said gates were found open on the morning after the killing of said stock. Said section foreman, in giving his testimony, said: "I suppose the horses got through onto the track by means of the open gate. I found the gates open. * * * The gate on the east side was thrown out. * * * The right-of-way fence along there was in good shape. I saw no evidence of the horses having come through anywhere except at the gate." He drew a diagram showing to the jury the situation of the railroad there, the side-track, the crossing, and the two gates. Said gates appear from the testimony of this witness to have been used principally by one Moreau, although it is

also shown, by all witnesses questioned upon that point, that said gates were the only way by which patrons of the road got access to said station with teams, and that said gates were used for that purpose. On being asked if he ever said anything to Moreau about keeping said gates closed, the section foreman of defendant testified as follows: "Yes, sir; I spoke to him after the horses were killed, but not before that. Since the horses were killed the gates have been in good shape. After the killing I went to work and fixed the gate. I fixed it permanently, the same as it is to-day, and it has never been bothered since. It has been locked for a month. I suppose Mr. Moreau put the lock on. I told Mr. Moreau if he didn't keep the gate locked, or keep it closed, that we would have to nail it up, and since then he has locked it with a chain and padlock. * * * I found the gate open almost every morning when I went down there until this killing. I would stop and get off and close them. I did that every morning." On being asked whether persons "in using the side-track there did not have to use those gates in order to get to the side-track," the witness replied: "I suppose they did. That was the only way, unless they pulled down the fence." He was asked the following question, "And weren't those gates used for the purpose of people going in to the side-track to load and unload?" and answered, saying: "That was the only way to get in there. It answered for both purposes, I suppose." Again he says in his testimony: "It was after this killing that I got after Mr. Moreau about the gates. I hadn't gotten after him before that, that I know of." The above statements were made by said section foreman while testifying as a witness on behalf of plaintiff. He was also called by defendant, and described said right-of-way fence. In this connection he said: "My duty is to see that the fences and gates are kept in good shape. The gates were all right until after the accident. I never had occasion to repair the gates before that. It was all in good condition. I have had occasion to close them several times. Almost every morning I went there I closed them. It was my duty to run over the track, and see that everything was in good shape, and then come back and go to work. Almost every morning when I came down I found the gates open. I found them open, and closed them very often." He further said: "I never called Mr. Moreau's attention to those gates before the 24th of September, although I found them open very often. I suppose they go through those gates to get to the siding to load and unload cars. That is the only way they can get there, unless they pull down the fence. It is a fact that, when cars are left there on the siding to be loaded, they make use of those gates for

the purpose of loading the cars. That is the custom." Defendant introduced its superintendent of bridges and road-master as witness on its behalf, who in the course of his testimony said: "It is my business to look after the fences, gates, crossings, etc., and keep them in shape as much as possible. Almost all the main line is fenced in." A considerable portion of the record is occupied in the recitation of testimony of witnesses concerning the condition of said right of way fence and said gates. Testimony on this subject was brought into the case by plaintiff and defendant, and not a single objection or exception appears by the record to have been made thereto by either party during the trial.

The jury was asked by defendant to return special findings, and, among others, it was asked to find by what act or default defendant was negligent in killing said animals, if such killing was found by the jury to be attributable to the carelessness or negligence of defendant. In answer to this the jury stated, among other things, that defendant was negligent in not keeping said gates closed and locked. This finding is complained of as unreasonable, and not founded upon evidence; and, further, that there was no foundation laid in the pleadings for the introduction of evidence on that subject.

There being no law requiring defendant to fence its right of way sufficiently to keep stock from going thereon, defendant's view of the case is no doubt correct in assuming that plaintiff could not rely upon any such duty on the part of defendant, nor rely upon the fact that said railroad right of way was not inclosed, to involve defendant in liability for killing the stock in question. There was, however, much evidence introduced in reference to said fence, and without objection by either party. Plaintiff does not contend that it was the duty of defendant to keep its right of way inclosed so as to prevent stock from going thereon, nor that, by reason of the absence of such inclosure, plaintiff could recover for the injury alleged. But defendant had alleged in its answer that "such killing and destroying was the result of plaintiff's own carelessness contributing thereto, for which this defendant was in nowise responsible." This allegation was denied in plaintiff's reply. Now, it does not appear on what theory so much evidence was brought into the case concerning said fence and gates. How could it appear on what theory that evidence was brought in, if both parties acquiesced in bringing it into the case, and did not even make an explanation of its bearings on the pleadings? It may have been introduced under the allegation of contributory negligence to show that plaintiff's stock broke through a lawful fence, and thus came

upon defendant's railway track. It seems that defendant relied to some extent upon the fact of having constructed the fence inclosing its right of way as evidence of due care on its part in the attempt to keep stock from going thereon, and evidence was introduced as to the construction and keeping in repair of such fence by defendant. As against such evidence, plaintiff introduced testimony tending to show the condition of the gateways as above mentioned. On such theory, it may have been justified by the pleadings, under the allegation and denial of contributory negligence. No objection was made to said evidence, and no opportunity was given the court to pass upon the point as to whether or not it was justified by the pleadings.

This evidence tended to present to the minds of the jury a state of facts by which it was apparent that when animals came along to such gateways they could freely pass in and stray along the railroad track, and, having passed beyond the gateways, were then fenced in close to said track, so that they could not retreat to the open country on the approach of a train. Considering that this circumstance may have increased the danger to stock, as compared to no fence at all, and considering the further fact, shown by the testimony of defendant's witnesses, that said gates were subject to defendant's control, and that after killing the stock in question defendant made and enforced a rule to the effect that, if said gates were not kept closed and locked by those who had the privilege of using the same, the railroad company would fasten said gates as stationary parts of the fence, and that this rule has had the effect of keeping said gateways closed ever since the killing of said stock considering, further, that if the conditions were such that said gates could not be kept closed, then open crossways over defendant's right of way, with the usual "cattle-guards," to prevent stock from passing upon defendant's railroad, within the inclosure, could be provided, if necessary; and considering, in reference to what would be the exercise of due care under the circumstances, whether the arrangement last mentioned would not be less dangerous than that described as existing, and that the fact of said gates being often left open, was known to defendant's agents and employés, who had control of them—considering these circumstances shown to the jury, we cannot say that its special finding, above mentioned is unreasonable or groundless in its premise.

It has been suggested that, if defendant was under a duty to keep said gates closed, there was but one effectual method of so doing, and that was to keep a servant at every gate, and place a guard over its entire property. In treating practical

questions of this nature, the difference between ordinary care and diligence, which the law exacts, and unreasonable extremity, which the law does not require, should be kept in view; and it should not be forgotten, in considering the case at bar, that defendant's own witnesses testified that it was the duty of defendant's agents and employes "to see that the fences and gates are kept in good shape," which evidence we have quoted above; and, further, that candor must admit that the record shows that, by a very simple and reasonable effort on the part of defendant's agents "after the killing," said gates had been kept securely closed. Plaintiff, was in no way responsible for the existence or continuance of those conditions respecting said inclosure; and therein the case at bar is entirely unlike the case of *Railroad Co. v. Mosier* (Ind. Sup.), 35 Am. & Eng. R. Cas. 196, cited by appellant, in which the gateways had been put in for the use of the owner of an adjoining pasture, and it was held that such owner, "for whose benefit a private crossing is maintained, and who is supposed to be fully cognizant of the condition of the gate, and the use to which it is put, must, therefore, as between himself and the company, see to it that the gate is kept in proper condition, and that it is kept close." We should unhesitatingly hold the same view in a proper case. The case of *Railway Co. v. Etzler* (Ind. Sup.), 19 N. E. Rep. 615, cited also by appellant, was determined under a statute, as appears by the statement, which provided that "owners of land separated by a railroad may of right maintain crossings over such railroad, and impose upon the owner the duty of repairing and keeping up gates thereto, and that railway companies, in the absence of negligence, shall not be liable for injuring and killing stock at such farm-crossings;" and it was held that under said statute a railroad company was not liable for injury to stock entering upon the track at such points, in the absence of negligence on the part of the company or its employes; and there was no negligence charged in that case. Plaintiff, however, does not rest his case altogether upon the circumstances shown to exist in reference to said fence and gateways, but appears to have brought the same to view as circumstances bearing on the case, as against the proposition of defendant that it had "maintained a good and sufficient fence on both sides of its track, although it was not required to do so by law."

To meet the effect of that position, plaintiff's counsel insisted that the undisputed evidence showing the condition of said gates, and the failure of defendant to use reasonable care in keeping them closed, destroyed all force of appellant's position in respect to its having maintained a good and sufficient fence on both sides of its track. This was the posi-

tion taken by counsel for respondent on the argument in this court, and to say that respondent's counsel abandoned that branch of the case in this court is, we think, a misconception of the plain terms in which he met that point of appellant's attack on the verdict. It follows very naturally, after asserting that respondent in this court abandoned all that branch of the case, to ask "why, under such circumstances, should the matter of the gates be treated as in the case?" This question at once betrays the error and unfairness of seeking to place counsel in the position of having abandoned that branch of the case. Is not the special finding of the jury as to negligence of defendant in carelessly leaving said gates open the burden of appellant's brief and argument? Why, then, should we refuse a consideration of that assignment? If respondent's counsel did abandon it, we could not rightfully refuse to consider that assignment which was urged as ground for new trial. And would it not be supreme folly for respondent's counsel to attempt to abandon a point which was urged as ground to annul his verdict, and which he could not abandon, but must face, as the court must consider whether or not it was ground for vacating the verdict? Appellant presented the finding of the jury as to the negligence of appellant is not keeping said gates closed, and assigned error upon it, and for that reason it happens that respondent could not abandon that part of the case so as to relieve this court of the duty to consider it. The reason for these observations will be apparent when all the views expressed by members of this court in the case are considered. As before observed, the evidence concerning said fence, produced by each party, was introduced without objection from either. For this reason we cannot sustain the proposition of appellant's counsel that no foundation was laid in the pleadings for the introduction of such evidence.

Passing to the other branch of the case, the jury found also that there was negligence on the part of appellant's engineer of the passenger train, in that he made no effort to stop said train before striking plaintiff's horses. Appellant insists that the evidence shows that at the time and place of killing said animals the condition of the weather and the darkness were such that defendant's agents and employes could not, by the exercise of ordinary care and diligence, have seen such stock on the right of way in time to avoid striking the same. It was shown that two trains passed over defendant's road during the night in question—a passenger and a freight train, either one or both of which may have struck some of said injured animals. As to the freight train, it is shown by the testimony of the

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engineer and fireman who accompanied that train that as it passed along the place in question said train struck one animal, and, to the best of their knowledge, only one, which animal was shown not to have been one of plaintiff's horses. The testimony of said witnesses is to the effect that said freight train was running slowly as it passed said place where plaintiff's horses were killed, namely, at the rate of about 10 miles per hour; that they observed an animal on the track, lodged in the cross-ties over a culvert; that the brakes were applied, and the power of the engine reversed, and said train brought to a stop just as the engine reached and ran partly upon said animal; that they saw other horses running away from the track, but they stated to the best of their knowledge said train struck no other animal. This testimony, in view of the fact that said train was proceeding slowly, and came to a stop at said place, would seem to come from witnesses who had quite favorable opportunity to observe what happened, and, it having been shown that the animal struck by that train was not one of plaintiff's horses, his testimony tends to show that the killing of plaintiff's horses happened by some other means.

As we proceed with this consideration, it will become important to find, if it can be ascertained from the record, at what time said freight train passed Kohr's Siding. Said freight train is referred to in the testimony of defendant's witnesses as No. 9. Its engineer, Smith, Testimony of employee. twice states the time said train passed Kohr's Siding on the night in question. Each time he states it as "about two o'clock, or somewhere in that neighborhood." The fireman who accompanied that train, McDuffy, also twice states the time it passed said place; once stating said time to have been "between two and three o'clock," and at another time saying it was "about three o'clock." The conductor of said train thrice states the time it passed said place; in each instance saying No. 9 passed Kohr's Siding at "2.45 or 2.50 o'clock." These were all defendant's witnesses. The conductor of said freight train is the only one who states the time exactly; and considering his position, and that he repeatedly stated it the same, we think it fair to assume that he knew the time. The passenger train in question was run from Butte northward to Garrison, during said night, and passed by Kohr's Siding at 3.35 o'clock of the morning in question. The testimony of the engineer and fireman who accompanied said passenger train is to the effect that when said train passed Kohr's Siding it was running at the rate of 35 or 40 miles per hour; that, as this train passed said place, two horses were struck by it and thrown off the track, and that

no other animals were struck by said train ; that the animals struck were not observed in time to avoid running upon them, because the darkness was increased by fog or mist in the atmosphere at the time and place, and for that reason the engineer and fireman were unable to see as far as usual in front of the train ; that, had the weather been clear, the engineer could have seen seven or eight car-lengths in front of his engine ; and with these conditions, and the exercise of care, he could have seen said animals, and frightened them from the track by sounding the whistle, and avoided striking them ; but because the night was stormy, and rain or mist was falling, and fog prevailing, the animals were not observed in time to sound a whistle before they were struck and passed, and therefore no whistle was sounded, or other alarm attempted.

Appellant insists that the testimony of the engineer and fireman of said train, they being the only persons present at the moment of said accident, and observing the conditions, and being uncontradicted, as appellant contends, is therefore conclusive to the effect that the killing of said animals was purely accidental, and could not have been prevented by the exercise of due care. The testimony of the engineer and fireman of said passenger train should therefore be carefully reviewed, and considered in comparison with all the testimony, and the circumstances surrounding the subject in question, brought to light by the testimony of the other witnesses.

George Howe, engineer of said passenger train, in testifying on behalf of defendant, said : "I remember on that night, or the morning of the 24th, striking some animals near what is termed 'Kohr's Siding.' It was just 3.35 in the morning. I struck and killed two head of horses. * * * The road was straight before the curve was reached, and straight afterwards, for a mile or so on the other side of where I struck the animals. According to my judgment, I struck the animals on the curve. It was dark, to the best of my knowledge. I did not see the animals for any distance before I struck them. I saw them about two car-lengths ahead. The reason I did not see them before was that it was foggy like, that night. Another thing, I could not see any further, being on the right side of the engine. I think I struck them on the curve. I think it was the curve. As near as I can remember, the curve is not very sharp, and it curves to the left as you go north. My side of the engine is on the right. If it was light, and the weather was good and clear, in going around that curve I suppose I could have seen six or seven car-lengths ahead on the curve. I was unable to make any effort to stop my engine and prevent the accident. I didn't have the time. My head-

fight was good." Again, speaking of said animals, this witness testified: "I saw no other animals except the two I struck at the time. Going at the rate I was, if I could have seen them, and sounded my whistle, it would have kept them out of the way. If I could have seen them ten car-lengths ahead, I judge I never would have struck them. I could not have stopped in ten car-lengths, but I could have given them warning enough to have gotten them out of the way. I had air-brakes fully equipped. I did not have time to sound my whistle. * * * If I could have seen the animals ten car-lengths ahead, I never would have struck them. All cars are not the same length. I presume ten car-lengths would be about 350 feet. I should have slowed down, so that I need not have hit them." He further testified: "I could not distinguish them. I only saw one. My fireman saw the other one. Both at the same time. One of the horses went off on my side, and I asked the fireman if I had struck any on his side, and he said I had, one. They were together, I presume." Again he said: "I struck the animals at about 3.35 in the morning. I had my headlight burning. I was over them, and it was not necessary to stop. I threw them off the track. I could see the horses about two cars ahead. A car averages 30 feet. * * * There is no particular thing that makes me remember that night from any other that I know of. I remember one of the horses striking the engine, and scaring me pretty badly, and I remember the night from my reports I made out to my division superintendent."

The fireman who accompanied the same engine, Nelson Bostwick, was called on the behalf of defendant, and in the course of his testimony stated: "I was firing for Mr. Howe on the occasion of the striking of these animals, on the 24th of September last. I first saw the animals about two car lengths of the engine. The engineer did not make any effort to stop the train and prevent the accident, because he did not have time to do so. He went over them so quick. I remember where Kohr's Siding is. With reference to that siding, we struck the animals about a quarter of a mile south. I remember the curve at that point. In reference to the curve it was just where we were going off from it that we struck them, as near as I can remember. * * * The night was very dark, and it was kind of foggy at that particular place. At that time, as we were going out of that curve, if it had not been foggy we could have seen over two telegraph poles in advance of the engine. We could have seen further if it had been on a straight track. That is as far as we could have seen, even if it had not been foggy. The fog was of an ordinary density. * * * At the time we struck the animals we were going at

the rate of about thirty-five miles an hour. * * * We only struck two animals; that is all we saw. I could not tell exactly in what distance a train going at the rate of thirty-five miles an hour, and well equipped with air-brakes, could have been stopped, if we had seen the animals, but we could have stopped within 40 or 50 rods,—that is probably the outside,—but it might have been stopped a little sooner. I saw those horses just at the curve. They were both together. As near as we could tell, we struck them both at the same time, or right within an instant of one another. It threw them off the track, one of them going off on my side, and one on the engineer's side. At the time we saw the animals they were both on the track, that is, between the rails, about two car lengths away. I don't think they were running at the time. They had apparently either been lying down on the track, or had just gotten on the track. They made an effort to get off, but we caught them before they could get off. We threw them both off nearly the same place, or within a few feet of one another. We were both on the locomotive, that is, I was, and I suppose he was. In going through the curve I could have seen the stock about two telegraph poles ahead, if it had not been foggy. * * * I couldn't tell what made the fog. It had been misting all the way down—a fog or mist, if you want to term it so. When it is misting it is generally raining a little. * * * I think the difference between two telegraph poles is about 180 feet. Take the poles at the ends and the one at the centre, and it would make three. On a clear night I could have seen that distance. * * * I didn't have time until after we hit them to ring the bell. Just before we struck the horses the whistle was blown for the station. We always blow the whistle for a passenger station. Kohr's Siding is a passenger station. It is termed a station on the railroad rules, and it has a name."

Other testimony was introduced by defendant to the effect that the weather was stormy, and rain or mist was falling, and fog prevailing, at the time in question. Testimony was also introduced by defendant that there was some curvature of the railroad track at the place in question, but it is not shown by such testimony how the view of the engineer is obstructed by reason of such curvature. The testimony introduced by the plaintiff is to the effect that such curvature is slight, and, notwithstanding the same, the track lies in plain and unobstructed view approaching from either direction to the place where said animals were killed.

McMaster, the plaintiff, in testifying as to said curve in the track, said: "There is very little curve there; it is almost straight." He was corroborated by one of defendant's wit-

nesses, McDuffy, who testified: "It is not a very quick curve. It is little curved there, and, after you strike the curve, it is almost straight track, going north." Plaintiff introduced testimony tending to prove that early on the morning following the killing of said animals there were no visible signs of rain or mist having fallen during the night previous; there being no dampness then visible on the ground, vegetation, or other objects, at that place. It appears that the examination was made by Byron Woods, a farmer, who testified at the trial that some of his men were threshing grain at his neighbor's stacks, and said: "I know it didn't storm during the night, because my stacks showed no rain on them on the morning of the 24th, and they commenced on the 25th." Again, in his testimony, he said: "There was no storm. I am sure of that. The section boss spoke to me about the horses on the morning of the 24th, when I went out to the ranch." He testified that he thought he rose about half-past five o'clock that morning. An attempt has been made to cast discredit on the testimony of this witness, because he said in his testimony that he thought daylight would be showing between two and three o'clock in the morning at that time of the year; therefore it is but fair to quote the witness's own statement on that point. They are recited in the record as follows: "I should think daylight would be showing between two and three o'clock in the morning at about that time of the year, though not very much, perhaps, at that time of the year. But I should think daylight would be showing a little at that time of the year at two or three o'clock in the morning." There is nothing positive in his statement on this point. He seems to have stated it in such a way that no one would regard it as more than his impression, not pretending that he had made special observation. No evidence was offered to show that said observation is untrue. It is merely mentioned in a spirit of disparagement, as though he was unworthy of belief because of that statement, which perhaps is not justified, considering the caution with which the witness spoke. Common observation, too, may show to those who care to observe, that in this altitude, and usually clear atmosphere, twilight holds on in the evening to a surprisingly late hour, and the appearance of dawn also shows at a surprisingly early hour. Perhaps the farmer has observed this. Those who criticise the statement of a witness should at least be willing to venture the assertion of some fact on which to rest such criticism. The jury was the judge of the credibility of witnesses in this case.

Plaintiff produced a witness, who testified that he rode from Butte on said passenger train, on the morning in question, and left said train at Deer Lodge, about four miles from Kohr's

Siding. This witness testified that he observed the weather particularly at that time, as he left the train, and walked towards his home, and that it was clear; that said train passed Kohr's Siding between 3 and 4 o'clock; that the weather was not stormy, and it was not dark, nor was any fog prevailing when he left said train at Deer Lodge; that he observed the weather particularly when he left the train at Deer Lodge; that he was unable to state positively the state of the weather at Kohr's Siding, but could state that the weather was clear a short distance from there. Plaintiff also introduced a report in writing, made by Smith, the engineer of said freight train which passed along by Kohr's Siding at 2:45 or 2:50 o'clock on the same morning in which said Smith reported the striking of the horse found over the culvert, and in which report he stated that the weather was clear at the time and place of striking said animal. Said Smith testified at the trial, however, and in his testimony stated that the weather was "stormy, rainy, and misty" at the time said freight train passed Kohr's Siding. McDuffy, the fireman on the engine of the freight train, in describing the condition of the weather at Kohr's Siding when said freight train passed that place, stated that "there was a slight fog that would hinder your sight to a slight extent. It was not so very dense;" and in another part of his testimony, he says of the weather at the time, "There was a slight mist at Kohr's Siding, as we passed there."

Plaintiff's horses were found lying beside the track, bearing the appearance of having been struck by a passing train; and the position which these animals occupied, as respecting one another, when found, was shown to be as follows: Proceeding northward in the same direction in which said passenger train was running, the distance from where the first animal was found to the last was shown to be about 800 feet; the distance between the first and second being more than 500 feet.

As to the position of said animals when found by said section foreman, he testified: "I remember finding some horses killed about the morning of the 24th of September last. There were four horses and a colt. I killed them when I found out that they were so badly mangled that they could not live. I killed and buried them. I found them down in the ditch. The first one was about the middle of the curve. Then there was another on the other side, about a couple of telegraph poles ahead of it; that was a mare. Then came the colt, and then another mare on the other side. Then at the bridge I found a horse." It appears said section foreman made a report in writing of said animals, as found by him, which report was introduced by plaintiff as evidence in this case, and shows, among other things: "One bay horse, cut in two;" "one bay

mare, three legs cut off;" "bay colt, back and hips hurt;" "one bay mare, legs cut off;" "one bay mare, legs broken." This report evidently includes the fifth horse found in the ties over the culvert, which is not concerned in this case. If all these animals were thus injured, and "down in the ditch," and "so badly mangled that they could not live," and the section foreman therefore killed and buried them, as he testifies, it is not likely that any of them were found very far from where they fell, after being struck by the train. It is shown beyond any reasonable question that said passenger train struck, and thus injured, plaintiff's four horses.

Now, in connection with the testimony of the engineer and fireman of that train, on whose testimony it is asserted the railroad company must be dismissed as without any fault, the above testimony of the section foreman should be noticed; first observing that it is testified, and not contradicted, that the curve of said road at the point in question is but slight; that it was almost straight. The section foreman who found said horses was called for both plaintiff and defendant. He was in charge of this section of the road. He buried said horses, and afterward they were dug up by plaintiff's order, so that said foreman ought to know in what position he found said horses relative to said curve and to one another. It was a slight curve, and he found "the first one about the middle of the curve. Then there was another on the other side, about a couple of telegraph poles ahead of it." It is shown in evidence by defendant's witnesses that the distance between telegraph poles is about 180 feet, and, if by a couple of telegraph poles he means double that distance, his statement is not far from agreeing with plaintiff, who measured the distance from the first to the second horse, and found it over 500 feet. "Then came the colt, and then the mare on the other side. Then at the bridge I found the horse," says said foreman. He mentions said animals from one to the other, going northward, the same as plaintiff did in giving the distances between them. Does this evidence of defendant's foreman have any bearing on the testimony of said engineer and fireman of said passenger train, which evidence of the latter witnesses it is insisted the jury and trial court, and this court, should take as conclusive, and dismiss the defendant? Of course, it was the duty of said engineer and fireman to run said train with due care, so as to avoid involving their employer in damages resulting from their carelessness or negligence. In this respect their conduct, as to whether they were faithful and trusty agents, was on trial in the case at bar. In their testimony they asserted that said passenger train struck only two horses, and that these two were struck about the

same instant, and they say they were knocked off the track. They do not pretend that said animals, or any of them, were dragged along by the engine. According to their testimony said animals were struck and passed so quickly, not even an alarm could be sounded. They ought to know something about what occurred, considering they had a good light, and could see 60 feet ahead of the engine, according to their admission. The fireman said the train struck two horses just as it was going off the curve. The engineer said, "according to my judgment, I struck the animals on the curve." Now, it is proved beyond a reasonable doubt that no other than said passenger train struck plaintiff's four horses, although these witnesses say that said passenger train struck only two. Bearing this in mind, it should be observed that, if said engineer and fireman were mistaken as to the number struck, they ought to know whether they struck them all at about the same instant, for they could undoubtedly perceive this by feeling the shock of striking animals of that proportion, as well as seeing. If what they say is true as to having struck what they did encounter at the curve and knocked them off the track, would not said four horses have been found at the curve—the animals were shown to be too badly mangled, and in such a way that it is not likely any of them moved beyond where they fell—instead of three being found beyond the curve, one over 800 feet beyond the first one? Or, viewing the testimony of said engineer and fireman in another way (we ought to reconcile it upon the theory that it is substantially true, if we can), they say they encountered only two horses, and struck them at the curve, and struck both about the same instant. They were mistaken in the number, because there were four, and mistaken as to throwing them off the track where struck, as the circumstances show. They should not be mistaken as to striking whatever were struck at about the same instant, instead of one at a time consecutively, and hundreds of feet apart; for they had the aid of both the sense of sight and feeling to make them sure about this fact, and, if any fact they stated was free from mistake, this should be. They made this fact positive and prominent all the way through their testimony. The same idea is involved in their statement that they struck and passed said animals at an instant, and before even an alarm could be sounded. This excludes the idea that they struck them separately, and at considerable distance apart, and emphasizes their positive statement that the horses they struck were encountered at about the same instant. So, taking this statement as true, there were four horses in number struck, and the engine either threw or carried three of them more than 500 feet, and dropped

one; carried two of them nearly 700 feet, and dropped another; and carried one over 800 feet before dropping it. When the proportion of ordinary horses is remembered, and the nearness of their bodies to the earth when struck by a railroad locomotive is considered, and then these distances are considered, and it is realized that 100 feet is far more than the width of our ordinary streets, and that even the space of an ordinary city block must be more than doubled to reach the distance which two of these animals were thrown, if it is to be believed the engine threw them to the places where found, would not the average mind demand experimental proof that such marvellous results occur where an engine strikes such animals, going at an ordinary rate of speed? No such proof was given. Are engines built for gathering up and carrying animals of that number and proportion, when it happens to encounter them on the track? or are railroad locomotives built so as to throw animals off, as the engineer and fireman said was the case in this instance? If the engine threw said animals off the track as it struck them, as the engineer and fireman assert, is it likely that it struck them simultaneously, as said witnesses assert? If the engine struck them all at about the same instant, as the engineer and fireman testified, then the engine threw or carried three of them along as aforesaid. Again, does the engineer or fireman know when the engine struck such animals as those in question, so as to mangle and throw them into the ditch as shown, especially when such engineer and fireman are furnished with a "good headlight," and can see "60 feet ahead?" If not, they should not speak so positively as to what happened, or declare positively that nothing else happened. If they knew what happened so well, they should have honestly said they struck four horses, as the evidence shows beyond doubt, instead of trying to further mystify and obscure the truth by seeking to make it appear that there were only two horses struck by said train. What could have been the purpose of this, except to shield their own conduct from blame before their employer? If they did not know so perfectly what happened, they should have honestly admitted it. The jury undoubtedly saw the contradiction and absurdity involved in their testimony, both in substance and in its tendency, when compared with undisputed facts and circumstances shown in the case. The court undoubtedly saw the same thing, and refused to disturb the verdict of the jury.

It has been sought to introduce into the judicial consideration of the evidence in this case a remarkable philosophic theorem and conclusion in respect to the effect of the curve in said railroad track mentioned in the evidence. The wit-

nesses all admit that said curve was slight—the road approached it on a straight line, made a slight curve, and proceeded in a straight line again. Without any statement of witnesses in the record to the effect that the curve in said track was such as to cause the path illuminated by the headlight to depart from the track, leaving the track in the dark for any distance whatever, that theory has been sought to be imported into the judicial consideration here. The premise is: First, there is a slight curve in the track at the place in question. It is not great, for no witness has ventured to assert that, and we have seen what is asserted on the contrary. The second proposition in the problem is that no evidence was introduced showing that invention had mastered the feat of compelling rays of light to travel through the atmosphere on a curve. So we have given—*First*, a slight curve; *second*, no appliance to cast rays of light around the arc of a circle. Conclusion: Hence it must be taken “as true that the light from the headlight of said engine shone on right lines, and, if the curve went to the left, the track left the area of illumination;” and that “naturally the engineer’s observation could not extend as far along the track as it would if the track were straight, so that the light would shine down in a straight line.” Of course no witness ventures to swear, as far as the record discloses, that the conditions were such at the time and place as to produce said effect. To ask for such proof may, in the view of some minds, betray the most profound stupidity, as though one should call for the proof of the effect of the laws of nature. But still we will venture to ask, further, if, before affirming the above conclusion as inevitable, a philosophic judge should not remember that rays of light radiate from their source, and illuminate, according to the strength of the light, in all directions, if allowed; and that rays may be reflected from a lamp in straight oblique lines, as in the case of a headlight of a railway locomotive, so as to illuminate a path much wider than the mere ties and track; and that while a slight curve might shift the illuminated path so that more of it would be on one side of the track than the other, yet might not the track still remain fully illuminated? According to the theory proposed, the engineer would be in darkness very much of the time, and liable to helplessly plunge into disaster, wherever the road had a number of even slight curves. Possibly the inventor of railroad appliances has not set such narrow bounds to the path illuminated by the locomotive headlight, even though he could not devise means to compel rays of light to follow the arc of a circle. He may have found it quite easy to allow the rays from the lamp to be shed upon a space wide enough to illuminate a

slight curve. There is no doubt a curve might be of such degree that in turning it the rays from the headlight would be thrown entirely away from the track beyond. But would it not be safer and more judicial in determining a given case to wait until it is shown by proof that the conditions are such as to produce that result? Railroad companies are generally represented by counsel among the ablest in the ranks of the profession, and, if such conditions really existed, would they not introduce into the case proof thereof by at least showing the degree of the curvature, and the width of space illuminated by the headlight, and thus lay the foundation for the consideration of such conditions? Would it not be safer and more judicial to stay by the record, and consider those facts and conditions which are shown by the evidence in the record, lest we run into delusive theories and conclusions, which have no application to the case under consideration, and thus endanger, rather than aid, in securing the rights of litigants whose cases come within our jurisdiction?

It is clearly shown what might have been done, by the exercise of ordinary care, toward preventing the destruction of said animals, if the weather was clear; and from these facts it appears that, in case the weather was clear, it is very likely the destruction could have been prevented by the exercise of due care. The testimony of the fireman accompanying said passenger train is to that effect; that said stock was up and moving, and that no alarm was sounded, and no effort made to stop or reduce the speed of the train. The evidence is conflicting as to the state of the weather at the time and place in question. The jury had before it the testimony of Patterson, who rode on said passenger train from Butte to Deer Lodge, which was to the effect that the weather was clear a short distance from the particular place where said animals were killed, and that it was not dark at the time, being about half past 3 o'clock of a September morning. There is no dispute about the time said train passed Kohr's Siding. The report of the engineer of the freight train, which passed the place at the hour of 2.45 or 2.50 o'clock of the same morning, was to the effect that the weather was clear at said place and time. This report was made immediately after the occurrence; and Engineer Smith, in his testimony, makes no explanation as to his having wilfully misstated the condition of the weather in said report, or as to his having been mistaken in such statement. The report was made to the superintendent, was a formal statement of the conditions and circumstances attending his striking the animal in the culvert, and the question as to the state of the weather was distinctly

Condition of
the weather as
a defence.

asked, and the answer was set down. The testimony of the other witnesses was to the effect that early on the following morning there was no indication of rain or moisture having fallen during the night previous.

Some of appellant's witnesses testified that a fog prevailed in spots, or "banks of fog," in low places, and that one of the alleged "banks of fog" prevailed where said animals were killed at the time of striking them. Counsel for appellant insists that the weather may have been clear a short distance away, and nevertheless foggy at the time and place said animals were killed. If this condition was in fact true (although defendant's witnesses are not in harmony on that point), it is then made to appear by the theory of appellant's counsel that the parties in charge of said passenger train ran the same through a mere "bank of fog," without the precaution of sounding a whistle, at the same high rate of speed which might be proper if the view was clear—at such a rate of speed that there was no escape for stock which happened to be on the track, although such stock was moving when the train approached—so fast that there was no time to even sound a whistle before the destruction was accomplished and passed by. The jury did not adopt the theory of appellant, and investigation of the evidence shows to us that there is testimony tending to lead to a different conclusion. We cannot, therefore, sustain the assignment that there is no evidence to support the verdict.

Appellant requested the court "to charge the jury that the testimony as to the circumstances of the killing of said animals was uncontradicted; that it was to the effect that the killing was an unavoidable accident; and that it failed to show negligence on the part of the trainmen; and that the jury should so find." The court refused to so instruct the jury, and appellant assigns such refusal as error. This request is based on the theory of the case and the showing of the evidence contended for by appellant, which we have been unable to find borne out by our investigations thereof, and therefore must conclude that the court committed no error in such refusal. The court gave the jury an instruction to the effect that it was the "duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; that if he failed to see an animal when he should see it, and thereby injures it, or if, seeing it, he does not use the appliances at his command to avoid injuring it, then the company is liable, unless it appears from the circumstances surrounding the case that the use of these means to stop the train would injure the lives of the passengers." Appellant complains that, "while such instructions

may state the law correctly as a general rule, it certainly is too broad when taken in connection with the particular circumstances attending this case." We think this and the other instruction complained of by appellant fall under the same observations which we have made as to the refusal of the court to give the instruction requested, the complaint being based on its view of the evidence, which we have been unable to adopt.

Appellant argues that respondent committed an act amounting to negligence which contributed to the destruction of said horses by turning them out to graze on the public domain in the vicinity of his ranch. We cannot concur in this proposition. Stock-raising, by utilizing the vast open ranges of this country, is, and has been since its settlement, one of the principal industries, which contributes to the prosperity of the common carrier as well as to the individual citizens. Numerous statutes have been passed from time to time during the history of Montana regulating the industry of stock-raising, and clearly recognizing and sanctioning the matter of allowing stock to graze on the public domain as proper and lawful. The whole theory of the general legislation of this state is against the proposition advanced by appellant's counsel.

It is our opinion that the judgment ought to be affirmed.

BLAKE, C. J., concurs.

DE WITT, J. (*dissenting*).—It is claimed that negligence by defendant is shown in two respects:

1. In not keeping the gates mentioned, closed and locked. In the complaint the negligence alleged is as follows: "That the said defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed said locomotive and cars on the said 23d day of September, A.D. 1890, that the same ran against and over the said horses of the said plaintiff, and killed and destroyed the same." This is denied by the answer. Negligence in leaving the gates open or unlocked is not mentioned in any pleading in the case. It is not the cause of action set up in the complaint. Defendant was summoned to court to answer for damages alleged to have been caused by operating its locomotive and cars. The jury found that it was negligent in this respect. But of this hereafter. They also found that the defendant was negligent in a wholly different matter—i.e., in leaving some gates open and unlocked. The respondent's counsel recognized that the jury had gone outside of the case, and found damages for an act that plaintiff had not complained

of in his pleading, and had not made his cause of action. Counsel, therefore, on his argument on the appeal stated that he abandoned any claim that his verdict should be sustained by virtue of the finding of negligence as to the gates, or the evidence in that behalf. Why, under such circumstances, should the matter of the gates be treated as in the case? The defendant was under no obligation, by law or contract, to build or maintain a fence along its right of way. This action arose before the act of the last session of the legislature. It seems, however that it did build and maintain such a fence. It put in these gates at the request of and for the accommodation of the neighbors at this point, not for any use of its own. It would not seem that building the fence and putting in the gates was negligence. The defendant did not use the gates, or, in using them, leave them open. They were opened and left open by some one other than the defendant. That person is not shown to be the one for whose acts the defendant was responsible. The defendant's servants frequently voluntarily closed the gates, when they found them open. Because they, without a duty upon them so to do, closed them whenever they found them open, was it negligence on their part that they did not always find them when they were opened by persons other than themselves? It seems to me not. But they were negligent in not keeping the gates locked and closed, it is held. If they locked them and retained the key, the result would be the same as if there were no gates; and I do not understand that it is claimed that it was negligence to build the gates. If they hung the key on the fence, or provided every passer with a key, the result would be the same as if there were no locking. But as to keeping the gates closed: The place was in the country, away from any town. If it was the company's duty to keep the gates closed, there was but one effectual method of performing this duty. That was to keep a servant at every gate along the line (and the evidence shows that they were very numerous), to close them after careless passers, who were strangers to the defendant. Is the defendant liable for such strangers' acts? If this be the law, the defendant must put a guard over its entire property to protect it from negligent acts of third persons, which negligent acts may result in injuries to others, and for which the defendant is to be held liable. I do not understand that such duty rests upon the defendant. The jury found that it did, to be sure; but respondent's counsel promptly abandoned any such ground in this court. In that I think that he was correct. I agree with him that in the matter of the gates no negligence was either pleaded or proved. In *Sweeney v. Railway Co.*, 29 Pac. Rep. 16 (last term), the allegation of the

complaint as to negligence was that plaintiff was working for defendant under defendant's car, and that defendant carelessly and negligently, and without any notice or warning to plaintiff, backed or ran an engine against said car, and set it in motion, and while so in motion by reason of said careless and negligent act of defendant, the car ran over plaintiff, etc. After a careful examination of the evidence in that case, this court held that there was a failure of proof that the defendant moved the car without warning, as alleged, and that, therefore, the evidence was insufficient to support the verdict. So in the case at bar, the allegation of the complaint is the negligence in running the locomotive and cars. Proof in reference to the gates does not tend to support the said allegation.

2. I will now examine the cause of action as alleged and relied upon by the plaintiff's attorney. The four horses were killed in the night between September 23 and 24, 1890. It may be taken as conceded that they were killed by defendant's passenger train No. 5, which passed Kohr's Siding, the place of the accident, at 3.35 A.M. The horses did not get on the track or right of way of defendant through any negligence of defendant. It may be considered as conceded that they did not get there through any fault of plaintiff. Under these circumstances, what happened? Plaintiff's witnesses do not testify as to the facts at the time of the collision. For those facts we must go to defendant's witnesses. The train came along, about its business, at 3.35 A.M. The track was near the river. The engineer testifies that he was in his position on the right side of the cab. That the track curved slightly to the left. He was running at 35 miles an hour, which was not a dangerous or unusual rate. His schedule time was 35 to 40 miles an hour at that point. The headlight was burning. He saw one horse on his side, and the fireman saw one on his. The engineer thinks that he struck the horses on the curve. The night was dark and misty and foggy at the time and place of the accident. He could not possibly see to exceed two car-lengths, or 60 feet. The train was equipped with air-brakes, and the engineer had it under control. He saw the horses about 60 feet ahead of the engine, on the track. He was on the right side of the engine. The track curved slightly to the left. It is not in evidence that there has yet been invented any contrivance to make the rays of light travel through the atmosphere on a curve. That being the case, I am obliged to take it as true that the light from the headlight shone on right lines, and, if the curve went to the left, the track left the area of illumination of the light. Naturally the engineer's observation could not extend as far along the track as it would if the track were straight, so that the light would

shine down it in a straight line. If it had been light and clear, the engineer says that he could have seen seven or eight car-lengths; and that, if he could have seen the horses ten car-lengths ahead, he could have slowed up sufficiently, and have alarmed the horses, so as to avoid striking them. Having but 60 feet of space, and running at 35 miles an hour, he could not stop or whistle or ring a bell; that is, he could not give his attention to stopping the train, and sounding alarms at once, in that distance, and at that rate. His first attention was given to applying his air-brakes. The following is his language: "I did not blow the whistle for the reason that I did not have time. I did not have time to ring the bell either. In an emergency, the first thing we do is to apply the air-brakes. That is where our safety lies. I did not have time to turn them. If I should have done anything, I should have applied my brakes. I got hold of them. I had my air on them just as I was going by, and I let it off when I saw that it was all safe." So it is testified, and it is not questioned that the engineer did his duty in getting to his brakes. Then he was past the horses, the danger was over, the damage was done. There was then no occasion for the bell or the whistle; and, before undertaking to use the brakes, there was no opportunity to sound the whistle or bell. The fireman's testimony is corroborative of that of the engineer. This is all the direct evidence of facts at the time of the accident. If this evidence is true, no reasonable being can read it and discover any negligence in the conduct of defendant. And, moreover, respondent's counsel does not undertake to claim that there is any evidence of negligence, if this testimony is true. He takes another position, viz., that the engineer and fireman did not tell the truth as to the circumstances of the killing. He says that there were manufacturing a case. This is a grave charge. It can scarcely be indulged as a presumption or assumption in regard to any unimpeached witnesses. These witnesses are unimpeached by any direct testimony. Respondent finds their impeachment in circumstances, and holds that the jury were the judges of their credibility, and that their conclusion is final.

Of course, circumstances may impeach a witness more conclusively than words. The circumstances which respondent calls to his aid are in two classes. I will examine them:

1. It was sought to impeach defendant's witnesses by evidence that the weather, instead of being misty and foggy, as the engineer and fireman testified, was clear. If this be true, much of the foundation of the defence is demolished, and defendant's main witnesses are impeached upon a very material point, and the jury were justified in ignoring their

testimony, as they did. Let us see. Witness Ramsdell testifies that the weather was bright and clear at 9 or 10 o'clock of the morning of the 24th. Byron Wood says that the weather was smoky, but the sun was shining so as to cast a shadow on the afternoon of the 23d and the morning of the 24th. That in the morning there was no evidence of rain having fallen in the night. He passed the night at Deer Lodge, four or five miles from Kohr's Siding. He would not pretend to say how the weather was at the place of the accident, as he was not there. He should think that daylight would show at 2 or 3 o'clock A.M. on September 24th. This was an impeaching witness. Possibly the value of his testimony may be to some extent gauged by his statement that daylight shows three or four hours before sunrise. J. H. Meyers came from Philipsburg, 50 miles from the place of the accident, on the morning of the 24th, passing Kohr's Siding at about 10 A.M. The weather was clear. Peter Patterson, a passenger on No. 5, left the train at Deer Lodge, about five miles before the train struck the horses. The weather was not stormy. He could not say that it was cloudy. Does not remember whether the stars were shining. There was no fog at Deer Lodge. He does not know how it was at Kohr's Siding, four or five miles away, and later than the time of his observation. Joseph Smith was at Kohr's Siding at 8 P.M. of the 23d and at 7 A.M. the 24th. The weather was good and no fog. Such is the evidence adduced to show that the defendant's witnesses falsified when they said that there was fog and mist at the place of the accident at 3.35 A.M. Not an impeaching witness testifies as to the weather at the time and place of the accident. They are as far away as 50 miles in distance and 10 hours in time. The one who gets the nearest in time—probably within 15 minutes—is 4 or 5 miles distant; and the witness nearest in place is several hours removed in time. The place of the accident was in the valley by the river. Is it not within the most ordinary knowledge that it could be perfectly true that mist and fog could hang over the railroad track, by the river, at such an hour as 3.35 A.M., and still, miles away, and hours later and earlier, the weather be clear? This is too plain to merit discussion or comment. There was not in this showing a *scintilla* of evidence tending to impeach the testimony of the engineer and fireman of train No. 5. There was no conflict of evidence as to the mist and fog at Kohr's Siding at 3.35 A.M., and for a considerable period each side of that exact time. The evidence was all one way, and was with the defendant.

But again, train No. 9 passed this point on the morning of the 24th, between 2 and 3 o'clock—about an hour before the accident. The engineer and fireman of No. 9 testified on the

trial that the weather was then foggy and misty. To impeach this engineer of train No. 9, a report of his was introduced in evidence, in which he reports the weather at that time as clear. Grant that his report was true, and that his testimony on the trial was false, and that he was successfully impeached. What did this amount to, at most? Simply that there was not fog or mist at the place of the accident an hour earlier in the night than the time of the accident. Can this be held as evidence that the fog and mist did not come up during the hour, and be present when train 5 appeared upon the scene? This would be indulging in meteorological presumptions unwarranted by any evidence in this case or any experience of mankind. Again, granting that the engineer of No. 9 was impeached, does that impeach the engineer and fireman of No. 5? If so, that would be reforming the old maxim, so that it could be said of a collection of witnesses on one side of a case, *unus falsus, omnes falsi*. Again, grant that there was no evidence of rain in the morning; that does not tend to show that fog and mist were not present in the night, and which fled before the sun. The whole evidence seeking to contradict the alleged presence of fog and mist at the time and place of the accident has not the substantiality of a cobweb. There was absolutely nothing in it upon which a jury could find an impeachment of the credibility of defendant's witnesses.

2. As to the other circumstances of impeachment: Respondent argues that the places in which the horses were killed establish that the manner of their taking off was other than as detailed by the defendant's witnesses. He says that first one was killed; the second was killed at a point 543 feet further on; the next 132 feet beyond; and the last, 125 feet further. That this fact shows that the engine chased the horses, taking them single-handed, picking them off one by one, as it was able to reach and slaughter them, after the manner of the historical battle of the Horatii and the Curiatii. But what is the evidence that the horses were killed at these points? In the first place, not a witness testifies, nor a circumstance shows, that the horses were killed at these points by the train; and, in the second place, not one of the horses was killed by the train. At 9.30 A.M. of the 24th the section foreman found the horses, all crippled, in the ditch, and so badly hurt that they could not live, and he killed and buried them all. The measurements from which we take the above figures were made a week or ten days after the killing, and were to the places of their respective sepultures. It is not shown that they were buried where they were struck. It is not shown how far they were thrown by the terrific force that met them, nor how far they moved in their crippled condition between

3.35 and 9.30 A.M. They were all alive when the foreman found them. To hold that it appears that they were struck by the locomotive at the particular places where they were afterward buried is, in the light of the facts, a pure assumption. So the whole fabric of impeachment dissolves. Defendant's witnesses are left uncontradicted, and their testimony shows that there was no negligence of defendant in this accident. It seems to be considered in the majority opinion that it may have been negligence to run the train on card-time through a bank of fog; but I supposed that the theory of the affirmance of this case was that the fog did not exist. I am of opinion that the judgment should be reversed, and a new trial ordered.

My remarks, made to this point, were filed with the majority opinion on March 28, 1892. Since that day, the majority opinion has received additional matter, among it the criticism of my views which is now contained therein. I have now, at the June term, carefully examined that opinion. There is matter therein to which, as it occurs to me, some pertinent suggestions might be made; but a further review on my part at this time would seem to me more in the nature of a debate than a judicial consideration, and neither useful nor profitable.

Killing Live-stock—Negligence of Railroad Company—Burden of Proof—Presumption against Railroad.—In *Birmingham Mineral R. Co. v. Harris* (Ala., June 17, 1893.), 13 So. Rep. 377, it was held, in an action against a railroad company for injury to stock, that the burden of proof was on the defendant to acquit itself of negligence; and that the law was reasonable, because, if it were otherwise, the plaintiff would be compelled to put the defendant's employes on the stand and prove by them their own negligence.

In *Louisville & N. R. Co. v. Barker*, (Ala., July 27, 1892.), 11 So. Rep. 453, it was held, where stock is killed by a railroad train, the burden is upon the railroad company to acquit itself of negligence. The court cited *Railway Co. v. Hughes*, 87 Ala. 610, 39 Am. & Eng. R. Cas. 674; *Railway Co. v. Moody*, 90 Ala. 46, 45 Am. & Eng. R. Cas. 524; *Railroad Co. v. Moody*, 92 Ala. 279.

In *Toledo, St. L. & K. C. R. Co. v. Jackson*, (Ind., Dec. 15, 1892.), 32 N. E. Rep. 798, it was held, in an action against a railroad company for the killing of a horse, that the burden was on the defendant to show that it could not fence its track at the place where the killing occurred without endangering the safety of its employes, where the plaintiff proved that the horse entered on the railroad track where it was not fenced as required by statute.

In *Birmingham Mineral R. Co. v. Harris* (Ala., June 17, 1893.), 13 So. Rep. 377, it was held, in an action against a railroad company for injury to stock, that it was proper to refuse a charge to the jury which required the plaintiff to show by what train the animal was killed, and that the defendant was negligent.

In *Birmingham Mineral R. Co. v. Harris* (Ala., June 17, 1893.), 13 So. Rep. 377, it was held, in an action against a railroad company for injury to stock, that, under the statute, the burden was on the railroad company to show a compliance with all the statutory requirements.

In *Ohio & M. R. Co. v. Craycraft* (Ind., Oct. 25, 1892.), 32 N. E. Rep. 297, it was held that a complaint in an action for damages to stock was sufficient to withstand a demurrer, where the charge was that the act which caused the injury was carelessly and negligently done, without charging the specific acts constituting the negligence.

Evidence—Contributory Negligence.—In *Richmond & D. R. Co. v. Buice*, 88 Ga. 180, in an action against a railroad company for the value of stock killed, where it appeared that, by the use of extraordinary diligence, the company might have saved the life of the horse by adopting different means of releasing him from his confinement in the trestle, yet the evidence showed clearly that the company used all ordinary and reasonable diligences, both to avoid driving him upon the trestle, and to release him therefrom after he fell and became confined between the cross-ties, it was held that a verdict for the plaintiff was not justified.

Allegations under Florida Statute.—In *Jacksonville, T. & K. W. R. Co. v. Garrison*, 80 Fla. 567, it was held that prior to the passage of the act requiring railroad companies to fence their tracks (chapter 3742), negligence was the basis of liability in an action against the company for killing live-stock on the track, and it must be alleged in the declaration; but an allegation that the engine and cars of the defendant company were so negligently and carelessly operated by the agents and servants of the company that the engine struck an animal described in the declaration, by means whereof it died, is sufficient.

Trains Run at Rapid Rate.—In *Central Railroad & Banking Co. v. Ingram* (Ala. April 13, 1893.), 12 So. Rep. 801, it was held that a railroad company is guilty of negligence where its trains are run in the night-time at such rate of speed that, by reason of the darkness of night, without any intervening unusual natural causes, such as fog or falling rain or snow, stock cannot be seen, by the aid of the headlight, in time to prevent injury by the use of the ordinary means and appliances with which trains are usually supplied.

In this case, after citing a number of opinions, the court said: "We think the rule of these decisions is a just application of the maxim 'sic utere tuo, ut alienum non lœdas.' Under the right of eminent domain the railroad company is empowered to appropriate the lands of others to the construction and operation of its road. It may locate its line of road through the farms and pastures of their owners as well as the unclosed commons of the country. Under our system all unclosed lands are common of pasture. The owners of stock have the right to suffer them to go not only within their own inclosures, but upon the commons. There is no principle which would require the stock-owner to fence against the railroad. That duty, if necessary to secure the railroad company the proper enjoyment of its property and franchises, with due regard to the rights of others, would devolve upon the company itself, and not the stock-owner. We are of opinion that if a railroad company knowingly runs its trains under such conditions as render it impossible for those in charge of them to prevent injury to stock straying upon the track, and such injury results, it ought to be held responsible for the loss. Such is undoubtedly the case when the train is run, in the night-time, at such fast rate of speed that by reason of the darkness of night stock cannot be seen, by the aid of the headlight, in time to prevent injury by the use of the ordinary means and appliances with trains are usually supplied. We do not mean to detract from the qualification of the rule expressed in *Railroad Co. v. Jones* (71 Ala. 487, 15 Am. & Eng. R. Cas. 549), *supra*. If the injury is not attributable to the rate of speed in view of the ordinary darkness of night, but resulted from intervening unusual natural causes, such as fog or falling

rain or snow, those in charge of the train being, in all other material respects, in the exercise of due care, the injury would be excused."

Gross Negligence of Engineer—Evidence.—In *Lynch v. Northern Pacific R. Co.*, 84 Wis. 348, it was held, in an action against a railroad company to recover damages for injury to horses, that the engineer was guilty of gross negligence, where it appeared that the railroad crossed a highway at a very acute angle, and that the train was running thirty-five miles an hour; where the engineer testified that he first saw the horses after he had blown the whistle for the crossing; that they were in a field near the highway, but that he paid little attention to them until he saw they were determined to go down the road and cross the track; that he then blew the stock alarm-whistle, and when he could not scare them off applied the air-brake, stopping his engine on the crossing, where it struck one horse; the evidence offered by plaintiff showing that the speed of the train was slackened thirty rods from the crossing, then increased until just before the crossing was reached, when the speed was again slackened.

Contributory Negligence in Placing Cattle in Unfenced Field.—See note, 15 Am. & Eng. R. Cas. 540; note, 20 Am. & Eng. R. Cas. 468.

BIRMINGHAM MINERAL R. CO.

v.

PARSONS.

(Alabama Supreme Court, July 22, 1893.)

Duty of Railroad Companies to Fence when Requested by Abutting Owner—Constitutional Law.—A statute of the state declaring that all railroads within the state "shall be required to put in cattle or stock-guards upon their respective lines of roads and keep the same in good order, whenever the demand is made upon them or their agents or employes by the owners of the land through which said road passes that said cattle or stock-guard is necessary to prevent the depredation of stock upon their farms," is not unconstitutional for the reason that it makes the land-owner the sole judge of the necessity of the fence, since, if the necessity for the fence was not left to the discretion of the abutting owner, the railroad company would be absolutely compelled to maintain the guards in question.

Liability for Depredations Committed by Cattle—Statute Imposing Absolute Liability—Constitutional Law.—A statute of the state which imposes upon railroad companies an absolute liability, irrespective of negligence, for the full amount of damages proven to have been sustained by abutting owners, upon whose land cattle have strayed through cattle-guards which the railroad companies are required to construct, is unconstitutional.

Same—Sufficient Complaint.—A count of a complaint which alleges that a railroad company "so negligently and carelessly left open their stock-gaps on that part of its road which runs through the said land of the plaintiff that" certain damages were suffered is demurrable, where the duty prescribed by the statute is to construct cattle-guards and keep them in order, and not to keep them closed.

APPEAL from Jefferson circuit court.

The gravamen of the first count of the complaint was that the damage was caused by the defendant's failure, on the plaintiff's demand, to construct proper stock-gaps where its road entered upon and left the plaintiff's fields, and that the stock-gaps which the plaintiff had constructed were so carelessly, negligently, and unskilfully made that the stock passed over them and caused the damage complained of. The gravamen of the second count was that, after the plaintiff demanded the erection of stock-gaps where the road entered upon and left plaintiff's land, the defendant so negligently and carelessly left open its said stock-gaps, as constructed, that stock entered upon plaintiff's land, and caused the damages complained of. The gravamen of the third count was that, after the demand by the plaintiff, the defendant negligently failed to put in stock-gaps of proper construction, and that, by reason of such failure, stock and cattle entered, through and by way of defendant's line of road, into the plaintiff's cultivated lands, where he had a crop, and caused the damages complained of. The defendant demurred, assigning to each count substantially the same ground of demurrer, which was, in effect, that at common law the defendant was not required to erect and maintain stock-gaps where its road entered and left the plaintiff's lands, and that the statute approved December 11, 1886 (Acts 1886-87, p. 163), creating such requirement, was unconstitutional and void.

Hewitt, Walker & Porter, for appellant.

W. R. Houghton, Francis D. Nabors, and Kennedy & Hickman, for appellee.

HARALSON, J.—The demurrer to the complaint, which was overruled, presents a single question for our consideration—that of the constitutionality of the act of the legislature approved December 11, 1886 (Acts 1886-87, p. 163). It is entitled "An act requiring railroads to build, and keep cattle and stock guards in order, upon their respective lines of roads." Its first section is: "That all railroads within the territorial limits of the state of Alabama shall be required to put in cattle or stock guards, upon their respective lines of roads, and keep the same in order, whenever the demand is made upon them, or their agents or employes, by the owners of the land through which said road passes, that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms." The second section provides that on and after the passage and approval of the act, as to all stock passing over or through cattle-guards upon any line of railroads in

this state, and committing depredations and damages to the owners of the land, the company shall be liable for the full amount of damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages, which damages can be recovered by suit in the justice or circuit courts of Alabama, where such damages were committed: provided, that the railroad company can only be required to construct cattle-guards whenever said company's road enters the field or upon the premises of any person, or where the premises, or any portion of the same, are exposed by reason of said road entering upon them, or running through them.

1. It is well understood that railroad companies are not bound, by any principle of the common law, to fence their roads, make cattle-guards, or erect any other barrier or stay against the intrusion of stock upon their roads or right of way, and are not liable for injuries happening merely for want of such erections. 7 Amer. & Eng. Ency. Law, pp. 906, 912; 1 Ror. R. R. 614; Railroad Co. v. Lyon, 62 Ala. 74. Whenever a company is under obligation to fence its right of way, or erect cattle-guards, it is by virtue of a contract or statute. On the other hand, it is equally well settled that acts of incorporation of railroad companies are subordinate to the general police regulation of the state, and that the requirement to fence their rights of way, and erect and maintain cattle-guards, falls legitimately within legislative authority. As is well said in American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 32: "The police power of a statute is a most important power, essential to its very existence, and has been declared by the supreme judicial interpreter of the federal constitution to embrace 'the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of good morals;' and the legislature cannot, by any contract, divest itself of the power to provide for these objects." Beer Co. v. Massachusetts, 97 U. S. 25; Van Hook v. City of Selma, 70 Ala. 361, 2 Am. & Eng. R. Cas. 23; Railroad Co. v. Baldwin, 85 Ala. 619, 7 Amer. & Eng. Ency. Law, 907.

Duty of railroad to fence right of way when requested.

The unconstitutionality of the act we consider is insisted on, "first, because it requires the railroad to erect cattle-guards whenever demand is made upon it, by the owners, that the cattle or stock guard is necessary to prevent the depredation of stock upon their farms, thus making the land-owner the sole judge of the necessity, and from whose decision the railroad has no appeal." This objection relates especially to the first section of the act. The criticism cannot be sanctioned. This is a mere option which the statute gives the

owner of the land. The guard—if, and when, constructed—is for his benefit alone. The public has no interest in it, further than the general interest every good citizen feels that every other person shall be protected in his rights of property; and of what detriment can it be to the railroad that the owner is permitted to exempt it from a duty which, without his exemption, would be absolute, whether the owner needed or desired the cattle-guard or not? If the statute had simply required the companies to erect and maintain these guards, in all instances, whenever they entered the field or premises of a party, there could, under the authorities, be no objection raised to the validity of the law. Why, then, should the statute, if, in its enactment, it would lighten the burden, if any, of the corporations, without injury to the persons whom it was designed to benefit, by bestowing this option on them, incur judicial displeasure? The point of this suggestion becomes more pertinent when it is remembered that when the duty to fence or build cattle-guards is made absolute, without reference to an option on the part of the owner of the land, the owner may release the obligation, as seems to be well settled. 7 Amer. & Eng. Ency. Law, 907; 1 Thomp. Neg. p. 526, § 26. The case of *Railway Co. v. Todd* (Ky.), 45 Am. & Eng. R. Cas. 481, is opposed to this view, and holds that this power of police regulation cannot be delegated to the citizen. No authority upon which the decision is based is given. The constitution of this state certainly contains nothing against the bestowment of such an option on the landowner, in connection with the exercise of this police jurisdiction and authority, and we are at a loss to see on what principle it can be denied. The states delegate this power, without question, in their creations of municipal governments, railroad commissions, medical and examining boards, quarantine commissions, the bestowment of the authority for the creation by the people of counties and parts of counties, of agricultural districts in which fences may be dispensed with, and stock not allowed to run at large, and in other instances, perhaps, which might be named; and it can be readily seen that this police authority may be more safely and beneficially exercised, often, in leaving its exercise to the option of others, within prescribed and proper limitations, than without.

2. There can hardly be any question but that this second section imposes an absolute liability on railroad companies “for the full amount of the damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages, whether they have failed or not, according to the requirements of the law, ‘to put in cattle or stock

Absolute liability of railroad—Unconstitutional statute.

guards upon their respective lines of roads and keep the same in order." Indeed, this liability is clearly stated in the words of the section itself. There are many conflicting authorities on this question, which we will not review, or attempt to reconcile. In 7 Amer. & Eng. Ency. Law, 907, it is stated that "statutes have been passed in England, and many of the states, requiring railway companies to fence their tracks [which includes cattle-guards. *Id.* 913], and holding them liable for all injuries occasioned by a failure to do so, irrespective of whether or not they have been guilty of negligence" in operating their trains; and many authorities bearing more or less intimately on the question are cited as supporting the text. *Id.* 927. Counsel for appellant, in their elaborate argument on the question (reviewing many of the authorities), conclude: "We concede that if the act of 1886 had imposed absolute liability in cases where the railroad fails to erect gaps at all, in compliance with the statute, this would have been a valid police regulation, because a penalty imposed for a violation of the act. But the act of 1886 goes further, and imposes such absolute liability on the railroad, though it may have fully complied with the act, in erecting and keeping in order its gaps, provided stock get over them and commit depredations. It is therefore manifestly unconstitutional, because it attempts to impose absolute liability, when the requirements of the act may have been fully complied with, and no negligence exists. This is not a valid police regulation." This question is not a new one in this court. In *Zeigler v. Railroad Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an act which provided: "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this state, shall be liable for all damages to live-stock, or cattle of any kind, caused by locomotive or railroad cars." It was there said of that statute that it dispenses with all proof of the wrong it seeks to redress. "It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employés—an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. * * * We can perceive of no reason, in law or morals, for holding them (railroad companies) to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident, or accidents which no human prudence can foresee or

avert." This case, in these utterances, has been many times approved by us, and other courts. *Wilburn v. McCalley*, 63 Ala. 443; *Mead v. Larkin*, 66 Ala. 88; *Davis v. State*, 68 Ala. 63; *Green v. State*, 73 Ala. 32; *Railroad Co. v. Hembree*, 85 Ala. 485, 38 Am. & Eng. R. Cas. 300.

Under the influence of these decisions, we are constrained to hold that the second section of said act, in that imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right. The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies "to put in cattle or stock guards upon their respective lines of roads and keep the same in order," and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the state. It may be maintained as such, separate from the second section. 3 Brick. Dig. p. 128, § 28; *Ex parte Cowert*, 92 Ala. 97. And "every person, while violating an express statute, is a wrongdoer, and, as such, is *ex necessitate*, negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor;" and when a duty is required, and no remedy provided for its breach, the remedy is by common-law procedure. *Grey v. Trade Co.*, 55 Ala. 403; *Lowndes Co. v. Hunter*, 49 Ala. 507; *Autauga Co. v. Davis*, 32 Ala. 703.

3. The demurrers to the first and third counts in the complaint were properly overruled. The second count bases a recovery on the allegation that the defendant "so negligently and carelessly left open its stock-gaps on that part of its said road which runs through the said land of the plaintiff that," etc., specifying the damages suffered. We are not certain of what is meant by leaving stock gaps open, and what negligence is attributed to defendant in so doing. Consulting our knowledge of such barriers against stock, we would suppose they were never designed to be closed, but always open. The duty prescribed by the statute is to put in cattle-guards, and keep them in order, and not to keep them closed. It would seem, therefore, that defendant violated no duty to plaintiff in keeping the gaps open, and the demurrer to the second count, for this reason, should have been sustained.

For this error the judgment of the court below of reversed, and the cause remanded.

Killing Live-stock—Absolute Liability of Railroad Company.—*Suit before Appraisal under the Statute.*—In *Cincinnati, N. O. & T. P. R. Co. v. Russell*, (Tenn., Nov. 18, 1892.), 20 S. W. Rep. 784, under the act providing that railroad companies shall be absolutely liable for the value of live-stock

killed or injured by trains on unfenced tracks, and providing that the value of stock so killed or injured shall be appraised, the report of the appraiser being *prima-facie* evidence of the value thereof, providing also that, after the appraisement, the claim shall be paid within 60 days after presentation, it was held that it was not necessary to have the damage appraised before bringing an action against the company; held, further, that the failure to have an appraisal did not make it necessary to bring the action under a statute providing that every railroad company failing to keep a watch on its locomotives shall be liable for all damages resulting from an accident or collision.

Statute Applies only to Actual Collisions.—In *Nashville, C. & St. L. R. Co. v. Saddler*, 91 Tenn. 508, it was held that the act of 1891, c. 101, making unfenced railroads absolutely liable for all stock killed or injured on or near their tracks, applies only to injuries resulting from actual collision from a moving engine or car. In this case the court said: "The language of the act forbids any other construction. The injury must be the direct result of contact with moving trains, cars, or engines." This construction had been given to the old law. Mill & V. Code, §§ 1298-1300; *Holder v. Railroad*, 11 Lea, 176, 13 Am. & Eng. R. Cas. 567. The later act is no more explicit on this point than the former. Similar acts in other states have been uniformly construed as applicable only to cases of injury from direct collision. Numerous cases are cited to this effect in 7 Amer. & Eng. Ency. Law, 928. To the same effect are the following: *Railroad Co. v. Shoemaker* (a Nebraska case), reported in 23 Am. & Eng. R. Cas. 565; *Holder v. Railroad Co.*, 13 Am. & Eng. R. Cas. 570; *Croy v. Railroad Co.*, 19 Am. & Eng. R. Cas. 610; *Knight v. Railroad Co.* (an opinion of court of appeals of New York), 99 N. Y. 25, 23 Am. & Eng. R. Cas. 188; *Railroad Co. v. Hughes* (a Texas case), reported in 4 S. W. Rep. 492; *Pennsylvania Co. v. Dunlap* (Ind. Sup.), reported in 81 Am. & Eng. R. Cas. 512. In these cases the animals seem from fright to have run ahead of the moving train, and on to a trestle from which they fell, not being touched by the moving train. The charge was erroneous upon this point, and for this error both cases must be reversed.

Necessary Proof on Part of Owner.—In *Wall v. Des Moines & N. W. R. Co.* (Iowa, Oct. 11, 1898.), 56 N. W. Rep. 486, it was held that a requirement of the Code that, in order to entitle the owner of stock which has been killed by the engine of a railroad company, upon whose right of way it has been allowed to stray, by reason of defective fences, to recover, it shall only be "necessary for him to prove the injury to or destruction of his property" should be construed with the other provisions of the statute on that subject, and does not dispense with all proof on the part of the owner, excepting as to the injury and destruction of his stock.

COMMONWEALTH

v.

WILSON.

(*Court of Quarter Sessions of Philadelphia County, Pa., September Sessions, 1880 ; 87 Legal Intelligencer, 484.*)

Railroad-ticket Brokers—Constitutional Law.—The Act of Assembly of May 6, 1863, and its amendment of April 10, 1872, which prohibits the sale of railroad tickets except by the agents of the companies, and makes a violation of the act a misdemeanor, is constitutional. State legislatures have the right to pass such an act.

N. W. Ker, Asst. Dist. Atty., *Wayne MacVeagh* and *Robt. Lesley*, for the commonwealth.

W. Horace Hepburn, for defendant.

LUDLOW, P.J.—The defendant was indicted for the violation of the following Act of Assembly, passed May 6, 1863, P. L. 582, and amended by the Act of April 10, 1872, P. L. 51, *Purdon's Digest*, 220:

1. It shall be the duty of the owner or owners of any railroad, steamboat, or other conveyance for the transportation of passengers to provide each agent who may be authorized to sell tickets, or other certificates entitling the holder to travel upon any railroad, steamboat, or other public conveyance, with a certificate, setting forth the authority of such agent to make such sales; which certificate shall be duly attested by the corporate seal, if such there be, of the owner of such railroad, steamboat, or other public conveyance, and also by the signatures of the owner or officer whose name is signed upon the tickets or coupons which such agent may sell.

2. It shall not be lawful for any person, not possessed of such authority, so evidenced, to sell, barter, or transfer, for any consideration whatever, the whole or any part of any ticket or tickets, passes, or other evidences of the holder's title to travel on any railroad, steamboat, or other public conveyance, whether the same be situated, operated, or owned within or without the limits of this commonwealth.

3. Any person or persons violating the provisions of the second section of this act shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such person or persons shall be convicted.

4. It shall be the duty of every agent, who shall be authorized to sell tickets or part of tickets or other evidences of the holder's title to travel, to exhibit to any person desiring to purchase a ticket, or to any officer of the law, who may request him, the certificate of his authority thus to sell, and to keep said certificate posted in a conspicuous place in the office for the information of travellers.

5. It shall be the duty of the owner or owners of railroad, steamboat, and other public conveyances to provide for the redemption of the whole, or any parts or coupons of any ticket or tickets, as they may have sold, as the purchaser, for any reason, has not used, and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used; and the sale, by any person, of the unused portion of any ticket, otherwise than by the presentation of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this act, and shall be punished as hereinbefore provided. Provided, that this act shall not prohibit any person who has purchased a ticket from any agent authorized by this act, with the *bona-fide* intention of travelling upon the same the whole distance between the points named in the said ticket, from selling the unused part of the same to the company that sold the same; and it shall be the duty of the said company to pay for such unused portion of the ticket the difference between the actual fare to point used and the amount paid for such ticket.

A demurrer was filed to the indictment, which was overruled *pro forma* by the court. The trial then proceeded in the usual way, and when the district-attorney closed the commonwealth's case the defendant, demurred to the evidence. The legal effect of this demurrer was to admit the truth of every fact proved by the commonwealth, and of every fair inference to be drawn from the facts; and the only question now presented to us is the question of the constitutionality of the act of assembly under which this indictment was framed. If the decision of the court is against the defendant the demurrer is overruled, and judgment may at once be entered upon the record for the commonwealth. It is as well to notice this effect of a demurrer to the evidence. A demurrer to the indictment only, if decided against the defendant, is always followed by an order giving the defendant leave to plead over, because he has had no trial by a jury. I know of but one instance in which this practice in a criminal court was ever departed from. In the Circuit Court of the United States for

Legal effect of
demurrer to
evidence.

the southern district of New York, a judgment was entered upon a demurrer to an indictment only, but Congress settled the question promptly, by an act which gives to the defendant in such cases a right to a trial by jury. Where, however, the demurrer is to the evidence, the cause has been heard upon its merits, and such a demurrer admits the truth of every fact proved, and the defendant stands alone upon the constitutionality of the act of assembly. If the evidence is clear, and the law applies to the case and is constitutional, the judgment follows as a matter of course. Demurrers to evidence are rare in Pennsylvania; but *Commonwealth v. Parr*, 5 W. & S. 345, established the law, and the question is no longer an open one.

This demurrer stands then only upon the decision of the question of the constitutionality of this act of assembly, and wherever such a question arises it becomes the court to approach the solution of it with caution. While the judicial department of the Government may destroy a law, every court in the commonwealth, and especially a subordinate tribunal, will only pronounce such a decision, having such an effect, where the law is clearly unconstitutional, and therefore void. Had the legislature of this state the right to enact this law?

In the view which we take of this case and of the facts proved, it is unnecessary to decide how far the legislature may restrict the right of an individual to sell a single ticket bought here or in another state, and make it criminal for that individual so to do; much of the reasoning which follows may apply to such a case, but that is not the cause developed by the evidence, for here the testimony produced presents the case of one who has established a business in Philadelphia, the whole object of which is to trade in railroad tickets; he is, in fact, a "ticket broker."

This law is attacked because it violates the provisions of the Constitution of the United States, in that it deprives a person of his property without due process of law; abridges the privileges and immunities of citizens of the United States; interferes with the right of Congress to regulate commerce with foreign nations and among the several states; and impairs the obligations of contracts. And the act is, as is argued, unlawful under our own and the Federal Constitution, in that it creates a monopoly in lawful business, and is an assumption of power not legislative in its nature. It is not true that this act of assembly deprives a person of his property without due process of law, for by the very terms of the act, the unused portion of any ticket may be sold to the company which issued it, "and it shall be the duty of said com-

Objections to
the statute
considered.

pany to pay for such unused portion of the ticket, the difference between the actual fare to the point used, and the amount paid for such ticket." Here the owner of the ticket is simply limited in the sale of the ticket to the company from which he bought the same, and is not deprived of it, or his property in it; and if the legislature may upon any valid ground (a point to be hereafter considered) thus limit a right, the law sins not against the clause in the constitution referred to.

But it is said that this law abridges the privileges and immunities of citizens of the United States. Upon the facts admitted here, what privilege or immunity of this defendant has been abridged? His right to establish a certain business, which the legislature has declared to be, in the preamble, the cause of "numerous frauds," has been curtailed, and it may be destroyed; but is this an abridgment of "immunity or privilege" within the meaning of the constitution of the United States? In a state of nature a man may establish any business injurious to health he pleases; he may, unless restrained somehow, destroy at will all who deal with him. In a state of nature men may store gunpowder in dangerous place, sell tainted meat, liquor without inspection and license, set up gambling-houses and houses of ill-fame, and do numerous other acts which any thinking man may imagine; but civilized men, living under a benign government, easily recognize the principle that rights and duties are reciprocal, and that these may grow out of the very fact that men surrender a portion of their natural rights in order that they may live together in civilized countries, under a common rule of action called the law. This principle was embodied in an authoritative declaration of the law by the court, in *Corfield v. Coryell*, 4 Washington, C. C., 371, where the meaning of the words now under consideration claimed and received the attention of the court: "We feel no hesitation in confining these expressions to privileges and immunities which are fundamental. * * * Among these are protection by the government of the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.*" If the clause in the constitution is to receive the construction contended for in this case, then all the laws above referred to, and many others which might be named, which, under a well-known principle (to be hereafter specified), have been sustained, must be in conflict with the Constitution of the United States, because the citizens' privileges and immunities have been destroyed or "abridged,"

and are void. To state such a result is to answer the argument made in this case upon this point.

But it is argued that the act of assembly impairs the obligation of a contract. The ticket sold in this case was simply, at best, the evidence of a contract, and not the contract itself. For convenience these tickets have been introduced, and the person who presents the ticket exhibits a card in the nature of a receipt; before this ticket was sold the act of assembly was passed, and when, therefore, the contract itself was made, this defendant must be presumed to have known that to contract with any one who was not an authorized agent of the company which had sold the ticket was a criminal act. The question in my mind is, not what was the contract made by the original holder of the ticket with the company in Boston, but what was the contract made in this jurisdiction. Was or was not that a contract prohibited by law? If the state can, for any legal reason, limit or restrain the sale of these receipts, then any contract made is illegal and void, and no obligation is "impaired" under the Constitution of the United States, for none legally existed or could exist.

The last point made and ably argued by the learned counsel for defendant, Mr. Hepburn, will develop the true principle upon which this law must be sustained, and will moreover develop and illustrate the admirable manner in which, upon a true interpretation of the law, the Constitution of the United States, and the sovereign authority of the individual States, may not only be harmonized, but made effective, under our delicate and complicated system of government.

By article 10 of the amendments to the Constitution of the United States, it is expressly provided, "That the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." In the case of *Railroad Company v. Husen*, 5 Otto 465, the Supreme Court of the United States declares: "We admit that the deposit in Congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. * * * It may be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, pauperism, or disturbance of the peace." No state legislature may with impunity interfere with the power which Congress possesses "to regulate com-

Interstate
commerce—
Extent of state
regulation.

merce with foreign nations and among the several states." Why? Because this power has been directly vested in Congress by the several states and the people thereof. Any obstacle to commerce or burden laid upon it is, by the authority of the Supreme Court of the United States, from the leading case of *Gibbons v. Ogden*, 9 Wheaton 1, to the present time, unconstitutional and void. To fall, however, within the prohibition, the law must be an obstacle or a burden within the meaning of the decision of the Supreme Court of the United States.

Can it be contended that a law which prohibits that which has become a fruitful source of crime is an obstacle or burden to commerce between the states? The law in effect declares that the railroad companies as common carriers shall exercise their franchises subject to a duty, to wit, the repurchase of unused tickets, but for reasons of public policy no unauthorized agent shall sell these tickets to any one. How does this limitation or restriction hinder transportation of either men or things, and "transportation (as has been said) is essential to commerce, or rather it is commerce itself." See *R. R. Co. v. Husen*, *supra*. The law does not prohibit the sale of tickets at all, but only limits the right to authorized agents of the company, and compels the common carrier, that is, the company, to repurchase. To prove the power exercised in this instance by the legislature of Pennsylvania, is in no just and legal sense such a regulation of "commerce between the states" as to impinge upon any provision in the Constitution of the United States, is not only to answer the last objection made to this act, but to develop the principle which sustains this and kindred laws.

We have already adverted to the fact that there resides in every commonwealth a fundamental right to protect her citizens. In *R. R. Co. v. Husen*, *supra*, it was said: "We admit that the deposit in Congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power." The principle thus admitted is founded under the Constitution of the United States, in the rights reserved to the states and the people thereof, and it has not only received the sanction of the highest court under the government of the United States, but that sanction has been emphasized in the *Slaughter-house Cases*, 16 Wal. 83, where the majority of the court firmly maintained the right of the state under the constitution. The power to create a police regulation then resides in the state, and in the state alone. Has the legislature of Pennsylvania exercised her right to declare what shall become a constitu-

Statute construed as police regulation.

tional police regulation with reference to the sale of unused railroad tickets, as a business, to be transacted by brokers throughout the commonwealth, or has a law been enacted which establishes a monopoly?

It would be useless to refer to a multitude of acts, already upon the statute-book, in which this power has been used. The learned assistant district attorney, Mr. Ker, referred in detail to at least fifteen or twenty laws, all of them analogous in principle to the law now under consideration. It would also be a mere affectation of learning to cite from the reported Decisions of the United States Supreme Court, case after case, in which the right of a state to enact laws in principle identical with the law now before the court, has been affirmed. Already we have in this opinion referred to opinions which, in our judgment, rule this cause. It is enough now to say, that in the case reported as the Slaughter-house Case, and cited *supra*, the doctrines pronounced by the Supreme Court of the United States, not only embrace a cause like the one now before this court, but go much beyond it. That great cause did not decide that a monopoly might be created, but that a commonwealth might do that which was demanded for the public welfare. Even Mr. Justice FIELD, one of the dissenting judges, declared that this "power extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised in a great variety of subjects, and in numberless ways."

In the argument of this cause it was publicly stated, by the learned gentleman, Mr. Mac Veagh, who assisted the district attorney, that large numbers of tickets had been stolen from emigrants going west, before the trains had passed Harrisburg; other tickets, which had expired by limitation of time, had been sold to ignorant and unsuspecting victims, while the conductors upon the road were daily importuned by the agents of brokers to sell to them unused tickets, thus presenting a temptation to otherwise honest men to become plunderers of the stockholders of this road. I do not take for granted these facts, and express no judgment upon them, but I have a right to assume that reasons based upon such facts were presented to the legislature, and that, influenced by these reasons thus presented, the legislature intended to destroy a business detrimental to good morals, and as bad in its effects as gambling itself. Viewed in this light, the preamble to this act of assembly has an incisive force. That preamble reads thus: "Whereas, numerous frauds have been practised upon unsuspecting travellers by means of the sale by unauthorized persons of railway and other tickets, and also upon railroads and other corporations, by the fraudulent

use of tickets, in violation of the contract of their purchase," etc.

Upon the trial of this very cause it appeared in evidence that, in addition to the ticket purchased from Altoona west, this defendant sold a pass, which had been given to an employé of the road to enable him to travel from Altoona to Philadelphia and *return*. This employé, finding his services wanted here, sold the return pass to this defendant, who in turn sold it to the purchaser who testified in the cause. A double fraud was thus perpetrated—one by this defendant, who knew exactly what he bought and afterward sold, and the other by the employé who might have been saved from this perpetration of a fraud upon the stockholders of this company, but for the temptation held out to him by this defendant. We have nothing to do with the wisdom of this act of assembly. With the facts, however, before me, it is not difficult to understand why the legislative department of the Government determined that the time had arrived when a business which produced results such as have been specified should be utterly destroyed, and, by a police regulation, it has been declared to be a criminal act to establish a brokerage business in the sale of "the whole or any part of any ticket or tickets, passes, or other evidence of the holder's title to travel on any railroad, steamboat, or other public conveyance."

This act of assembly is, under the evidence in this cause, constitutional, and judgment will be entered, upon the demurrer to the evidence, for the commonwealth.

Constitutionality of Statutes Prohibiting Ticket-scalping.—The recent agitation of this subject in the legislatures and courts of many of the states has made it seem advisable to report in full in this series the above decision, especially since it is believed to be the only authority upon the question to be found in the books.

GOWEN

v.

HARLEY.

(*U. S. Circuit Court of Appeals, Eighth Circuit, July 10, 1893,*
56 Fed. Rep. 973.)

Master and Servant—Duty of Master to Furnish Tools—Contributory Negligence—Risks of Employment.—Where two men were employed to transfer a box weighing two hundred and fifty pounds from one railway car to another, a distance of five feet, which duty they had performed regularly for three months, the employer was not required to furnish a skid for transferring the box, although it had promised to do so upon the request of one of the servants, who had requested the skid, not because it was dangerous to move the box without it, but merely for convenience; and where the said servant was injured by reason of moving the box in a particular way, when a more convenient and safer method would have suggested itself to a prudent and careful man, he could not recover from his employer damages for his injury. Employers are not obliged to furnish tools for the prosecution of tasks which require mere manual labor and can be performed without the use of tools.

IN error to the U. S. Circuit Court for the western district of Arkansas.

Action for personal injuries.

J. W. McLoud, for plaintiff in error.

Joseph M. Hill (*L. P. Sandels*, on the brief), for defendant in error.

Before SANBORN, circuit judge, and SHIRAS and THAYER, district judges.

SANBORN, J. (*omitting points on jurisdiction*).—On June 20, 1891, Harrie Harley, the defendant in error, fell out of the door of a car of the Choctaw Coal & Railway Company, hereafter called the Choctaw Railway Company, at South McAlester, in the Indian Territory, while he was endeavoring to move a train-box from another car into the one from which he fell. He struck on his head and hurt himself. He was an employé of the plaintiff in error. For his injury he brought this action against Francis I. Gowen, the plaintiff in error, hereafter called the defendant, and E. D. Chadick, as receivers of the Choctaw Railway Company. Gowen was the acting receiver, and alone answered. There was a trial by jury, a verdict for the plaintiff, and a judgment upon it. The writ of error in this case was sued out to reverse this judgment.

This was the case: About the 1st of February, 1891, the

plaintiff was employed by the defendant to clean cars at South McAlester. It became his duty, with the assistance of the porter, to transfer from one car to another a train-box that weighed about 200 or 250 pounds, and a safe, at about 6 o'clock in the evening of each day. *Case stated.* Each end of the train-box was provided with a handle. There was a door on the side of each of the cars, and the cars were so placed when the transfer was made that these doors were opposite each other, and about five feet apart. The surface of the ground between the cars at the place where the transfer was effected was hard and smooth, and the shoulders of a man standing upon it were about the height of the floors of the cars. When the plaintiff entered upon this employment the box was transferred in this manner: There was a double bell-rope about 18 inches long attached to one of the handles of the box. The porter would shove the box part of the way out of the doorway of the car, and take hold of the rope. The plaintiff would stand in the doorway of the car opposite, take hold of the jamb of the door with one hand, seize the handle of the box with the other, and the two men would then swing it across into the car in which the plaintiff stood. As they were in the act of swinging it over in this way on June 20, 1891, the rope came untied, and the plaintiff fell out of his doorway, and was injured. The rope was attached to the handle of the box by the plaintiff or the porter. It was not one of the appliances furnished by the defendant. The box had been transferred in this way before the plaintiff entered upon this employment. A few days after he commenced the discharge of his duties he asked the master mechanic of the defendant for some skids to slide the box and safe across upon, and the next day he was supplied with a couple of planks, which he used until some time in May, when he was taken sick and lost them. He returned to this work on May 20, 1891, and transferred the safe and box by swinging them across daily from that time until the accident, June 20, 1891. Within three days after he returned, and six or seven times in all between May 20th and June 20th, he asked the proper officers of the defendant for skids, and they promised to furnish them. The last promise was made within three days of the accident. The only reason he asked for the skids was that he thought it would be easier to slide the safe and box over upon them than to swing the mover. He did not consider it at all dangerous to transfer them without skids or planks before the accident. The assignments of error go to the jurisdiction of the court below and to the sufficiency of the evidence. * * *

At the close of the evidence the defendants requested the

court to instruct the jury to return a verdict in their favor; and the next question is, Should this request have been granted? The rules of law by which this evidence must be measured, and in accordance with which this question must be determined, are briefly these: It is the duty of the trial court at the close of the evidence to direct a verdict for the party who is clearly entitled to recover, where it would be its duty to set aside a verdict in favor of his opponent if one were rendered. *Railway Co. v. Davis*, 53 Fed. Rep. 61, 3 C. C. A. 429; *Monroe v. Insurance Co.*, 52 Fed. Rep. 777, 3 C. C. A. 280; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 733; *Railway Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323; *Railway Co. v. Cox*, 145 U. S. 593, 606; *Meehan v. Valentine*, 145 U. S. 611, 618.

It is the duty of the master to use that degree of care commensurate with the character of his various operations which an ordinarily prudent person would exercise under like circumstances to supply his servants with reasonably safe machinery and appliances with which to perform the service assigned to them. A breach of this duty is actionable. But where the service required is performed on the surface of the earth, in open day, and its character and the appliances used in its performance are simple, the care required of the master is much less than when the machinery used is dangerous and complicated, or the work is performed in a place or at a time when its surrounding dangers are not so obvious. *Railway Co. v. Jarvi*, 53 Fed. Rep. 65, 68, 3 C. C. A. 433, and cases cited.

On the other hand, it is the duty of the servant to exercise that degree of care commensurate with the character of his occupation and the occasion which a reasonably prudent person would employ under like circumstances in order to protect himself from injury, and if he fails to exercise that care he cannot recover of the master for an injury to which his own negligence has contributed, even though his master has failed to exercise due care on his part. *Railway Co. v. Jarvi*, 53 Fed. Rep. 68, 3 C. C. A. 433, and cases cited. A person who is of age and of ordinary capacity assumes the usual risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to a reasonably prudent person under like circumstances by the exercise of ordinary care and foresight. One of the usual risks he thus assumes is the danger from the negligence of a fellow-servant who is engaged with him in a common employment in the service of the same master. *Railroad Co. v. Baugh*, 54 Am. & Eng. R. Cas. 328.

Duty of master.

Duty of servant.

To the last rule there is this exception. If a servant who is aware of a defect in the instruments with which he is furnished notifies the master of such defect, and is induced, by the promise of the latter to remedy it, to remain in the service, he does not thereafter assume the risk from such defect until after the master has had a reasonable time to repair it, unless the defect renders the service so imminently dangerous that no prudent person would continue in it. *Hough v. Railway Co.*, 100 U. S. 213, 225; *Railroad Co. v. Young*, 49 Fed. Rep. 723, 1 C. C. A. 428; *Greene v. Railway Co.*, 31 Minn. 248, 15 Am. & Eng. R. Cas. 214; *Railway Co. v. Watson*, 114 Ind. 20, 27, 33 Am. Eng. R. Cas. 334.

The first question to be determined under these rules is, Was there any evidence in this case that the defendant was guilty of negligence—that he failed in the performance of his duty to provide reasonably safe appliances for the performance of the work required of the plaintiff and his fellow-servant? The surface of the ground between the cars at the place where the transfer of the box was effected was smooth and hard, the floors of the cars were at the height of the shoulders of a man standing upon the ground between them, the box weighed 200 or 250 pounds, and had a good handle on each end of it. Two able-bodied men were employed to take this box from the floor of one car, carry it a space of five feet, and put it in the open door on the floor of the opposite car. It was urged that this defendant was guilty of negligence here because he did not furnish a skid for these two men to slide this box upon from one car to the other; that a man of ordinary prudence would have foreseen that this box could not be safely transferred without such a skid, and would have furnished it. Is, then, every master who employs two men to move a weight of 250 pounds a distance of 5 feet or more, without planks or skids to slide it upon, guilty of negligence? Yet it is to this absurd conclusion that the plaintiff's contention necessarily leads, for a safer place or more favorable conditions for this work can hardly be imagined than those presented in this case. It would require strong evidence to lead a reasonable man to such a conclusion. The record discloses no evidence that would warrant such a result, and the plaintiff himself testifies that he never thought of its being dangerous to transfer the box without the skid until after the accident. We think the jury should have been instructed that there was no evidence in this case of any breach of duty on the part of the defendant, and that for this reason they must return a verdict in his favor. *Aerkfetz v. Humphreys*, 145 U. S. 418; *Tuttle*

Duty of master to furnish tools—Contributory negligence.

v. Railway Co., 122 U. S. 189, 196; *Goodlett v. Railroad Co.*, 122 U. S. 391, 410.

There are other considerations that lead to the same result. If there were any risks or dangers about the transfer of this train-box, they were perfectly obvious to the plaintiff, and he assumed them. He, far better than any of the officers of the defendant, knew the risks attendant upon this transfer, because he had performed this work daily for three months, and they had never assisted in it, and seldom saw it done. It is insisted by plaintiff's counsel that he can escape from this rule under the exception we have stated—that where a servant is aware of a defect in the machinery furnished, and notifies the master of it, and he is induced, by the promise of the master to repair it, to remain in the service, he no longer assumes the danger. The reason on which this exception stands is that, where the servant may have been induced, by the promise of his master to remedy a defect, to expose himself to risks from it that he might otherwise have avoided by leaving the service, the master ought not to be permitted to deny his sole responsibility for those risks. The case before us does not fall either within the exception or its reason: First. Because the plaintiff apprehended no risk or danger from the want of the skid, and hence could not have been induced to stay in the service, and expose himself to danger, by the promises of the defendant to furnish it. He testifies that the only reason he asked for it was because he thought it would be easier for him to slide the safe and train-box over on it than to swing them across from one car to the other. He expressly says that he never before the accident thought of its being dangerous to swing them over, and that he did not regard it as at all dangerous to do so. Second. Because no tools or appliances were necessary to transfer this box with a reasonable degree of safety; and the plaintiff was employed to do this work, and did do it, entirely by hand. A servant who is employed to perform a simple act of manual labor, the risks of which are obvious, cannot escape from his assumption of those risks by proof that the master promised to furnish him tools by the use of which his work could be done in a different way, or more conveniently, or even more safely, if it could be done with reasonable safety without the tools. *Railway Co. v. Watson*, 114 Ind. 20, 27, 28, 33 Am. & Eng. R. Cas. 334; *Marsh v. Chickering*, 101 N. Y. 396, 400.

The master is not required to have his work done in the safest or most convenient way. He is not required to furnish tools for its performance if it can be performed with a reasonable degree of safety without them. The errand-boy whose duty it is to climb the stairs in a high building daily cannot

recover of an employer for a fall down the stairs on the ground that the latter had just promised to furnish him an elevator for his convenience or for his safety when the stairs themselves were reasonably safe. The mason who is placing heavy stones upon a wall by hand cannot recover of his employer if he takes up one that is too heavy for him, and it falls upon his feet, on the ground that his employer had just promised to furnish him an inclined plane upon which he could roll the stones upon the wall. Nor can the plaintiff who was employed to carry this train-box, without tools or machinery, from one car to the other, recover here because the defendant had promised to provide him with planks or a skid on which he could slide it across. The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant has notified him, and which he has promised to repair, governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use, and to cases in which tools or machinery are necessary for the safe performance of the work. It has no application to a case where the service required is simple manual labor, without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety. *Tuttle v. Railway Co.*, 122 U. S. 189, 194; *Richards v. Rough*, 53 Mich. 212, 216; *Hayden v. Manufacturing Co.*, 29 Conn. 548, 558; *Marsh v. Chickering*, 101 N. Y. 396, 400, 401.

Duty of master to furnish tools.

Finally, it appears from the evidence that this accident was the direct result of the negligence of the plaintiff and his fellow-servant. There was a perfectly safe way to transfer this box without the skid. The two men could have placed it nearly half-way out the doorway of the car, then stepped to the ground, drawn it upon their shoulders, carried it across, and placed it in the doorway of the opposite car. This was an obvious, natural, and safe way to perform this work. They chose another way. They attached (we say "they" because it appears that one of them did it, but there is some doubt which one, and that is not material) a double bell-cord, about 18 inches long, to one of the handles of the box so carelessly that it became untied as they were transferring the box. The porter pushed it half-way out of the car, and took hold of the rope. The plaintiff stood in the doorway of the opposite car, placed one hand on the jamb of the door, and grasped the handle of the box with the other. They then undertook to swing it across the space between the cars. The rope became untied, the

Negligence of servant.

plaintiff was pulled from the doorway by the weight of the box, and fell upon his head. It was obviously more dangerous for the plaintiff to attempt to carry 125 pounds in the stooping position he must have assumed, with nothing to prevent this weight or his own body from falling to the ground but his hold upon the door-jamb, and to rely upon the loosely tied rope to hold the box, than it would have been to have stood firmly upon the ground beneath it, and held the box upon his shoulder as he carried it from one car to the other with the aid of the porter. Where there is a natural and safe method of performing his service, and the servant carelessly pursues a method that is obviously more dangerous, he is guilty of contributory negligence, and cannot recover. *Russell v. Tillotson*, 140 Mass. 201.

Our conclusion is that the court below should have instructed the jury to return a verdict for the defendant:

Because there was no evidence that a reasonably prudent man in the exercise of ordinary care would have thought it necessary to furnish skids or any other tool or appliance to enable two men to move a box weighing 250 pounds with reasonable safety a distance of 5 feet from one car to another when the surface of the earth between the cars was smooth and hard, and the floors of the cars were at the height of the man's shoulders as they stood between them;

Because whatever risks there were in the transfer of the box were obvious, and better known to the plaintiff than to the officers of the defendant; and

Because the injury was the direct result of the negligence of the plaintiff and his fellow-servant.

The judgment below is reversed, with costs, and the cause remanded with directions to grant a new trial.

Risks Assumed by Employe Willingly Undertaking Dangerous Work.—
See *Coombs v. Fitchburg R. Co.* (Mass.), 53 Am. & Eng. R. Cas. 353, note, 355; *Davis v. Balt. & O. R. Co.* (Pa.), 53 *Id.* 372, note, 374.

UNION DEPOT Co.

v.

CHICAGO, KANSAS & NEBRASKA R. Co. *et al.*(113 *Missouri*, 218.)

Union Depot—Extension of Line after Contract for Use of Depot—Rental.—Where a number of railroad companies contract with a union depot company to pay equal rentals for the use of a depot, one of the companies whose line terminates at such depot may, after acquiring by lease another railroad which forms an extension of its line through the said depot, have the use of the depot for all of its trains running over its original and its leased lines, for the yearly rental originally contracted to be paid, although the leased line was paying the said depot company, at the time of the lease, a certain rental under a temporary arrangement.

Same—Temporary Rental by Railroad not Construed as Contract from Year to Year.—Where the directors of the union depot company resolved to allow a certain railroad company the use of its depot and track privileges “on the basis of one eleventh of eight per centum per annum on the cost of the property, and one eleventh of the operating expenses * * * as a temporary arrangement,” and by a later resolution admitted the said railroad company as a tenant to the use of its depot, “for an annual rental based on eight per cent of the cost of the property and one twelfth of the operating expenses,” and afterward resolved that the said railroad company be charged a rental “of one twelfth of eight per cent of the cost of the property and with one twelfth of the current expenses and taxes,” the rent being demanded and paid monthly, the said depot company having before it at the time the resolutions were passed an application of the said railroad company to be admitted as a party to a previous contract with other railroad companies, the said resolutions read together must be construed to declare the basis on which the monthly-rent bills were to be paid, and the payment of rent under them did not have the effect to create a contract running from year to year.

APPEAL from Jackson circuit court.

Watson J. Ferry and Frank Hagerman, for appellant.

McDougal & Sebree and Gardiner Lathrop, for respondents.

BLACK, J.—At the close of the evidence the plaintiff took a compulsory nonsuit, which the circuit court refused to set aside, and hence this appeal.

The plaintiff is a corporation owning and operating at Kansas City a depot, with the necessary buildings, sheds, tracks, and offices, all designed to accommodate the different railroads at that place. The depot company brought this suit against the Chicago, Kansas & Nebraska Railway Company, hereafter called the Nebraska Company, and against the Chicago, Rock Island & Pacific

Case stated.

Railway Company, hereafter called the Rock Island Company, to recover rents for the months of May to October, 1889, both inclusive, amounting to some \$6700. The petition avers that the rents sued for were due for the use of the depot by the trains of the Nebraska Company, which trains, it is alleged, were operated by the Rock Island Company. The defendants say the trains alleged to be the trains of the Nebraska Company were in fact the trains of the Rock Island Company, and that the latter company had a contract with the depot company, by which it had the right to use the depot for all of its trains for one rental, and that it had paid this rental for the months named in the petition, and so the circuit court held. The question whether the Rock Island Company was under any obligation to pay more than one rental depends upon the construction of the contract.

In 1876 there were six railroad companies whose roads terminated at Kansas City. Besides these roads, the road of the Missouri Pacific Railway Company extended from St. Louis to Kansas City, and thence on west to Atchison, in the state of Kansas. The Union Depot Company as party of the first part, and these seven companies as parties of the second part, entered into a written contract, dated the 1st June, 1876. As this contract is lengthy, we shall state the substance of it, quoting those parts deemed most material.

It begins by saying that whereas, the respective railroads of the parties of the second part "terminate at or run into and through Kansas City," and to prevent expense and avoid the accumulation of separate stations, a necessity has arisen for a Union Depot; and whereas, the Union Depot Company has become incorporated for the purpose of maintaining such a depot of "sufficient capacity to accommodate the trains of the railroads of the second parties," and the second parties have agreed to occupy and rent the same when completed; "and whereas, for the protection of the parties hereto, it is important that the rights, duties, and liabilities of each in regard to the whole subject of said depot, its appurtenances, use, care, control, rental, taxes, expenses, renewals, and repairs shall be stated and defined"—it is agreed as follows, each of said railroad companies acting for itself and independently. The first and second clauses make it the duty of the Depot Company to acquire the necessary land, and to erect depot-buildings, sheds, tracks, etc., the character and cost of the buildings to be subject to a governing board. The third clause provides: "Said several railroad companies, party of the second part hereto, agree to pay to said party of the first part, for the use of said depot, an annual rental amounting to

Contract with
depot com-
pany.

ten (10) per cent interest on the total ascertained outlay for actual cost of said depot, including grounds, buildings, tracks, siding, switching-yards connections, and all needful appurtenances, and, in addition thereto, the expenses of maintaining and operating the same, and of all repairs thereto, and all taxes." The rental to be paid by any one company is not to exceed a designated amount per annum, and the total outlay is not to exceed a named sum, except with the written consent of the several railroad companies. "And provided, further, that all rentals for use of said depot and appurtenances derived from railroad companies not parties hereto, and all rentals and receipts for said depot or appurtenances from any source whatever, shall be applied as a credit upon and in reduction of the amount so as aforesaid to be paid as rental by the several railroad companies parties hereto." The ninth clause provides: "The Union Depot shall be used by said railroad companies, parties hereto, for all their passenger trains destined for or departing from Kansas City; and all railroad companies using said depot shall run their passenger trains to and from said depot, unless otherwise expressly permitted by said governing board."

The contract contains many other stipulations, some of them to the effect that the amount of rentals to be paid by railroad companies not parties to the contract shall be subject to the governing board; that the rentals to be paid by the parties to the contract shall be paid monthly; and that the persons constituting the governing board shall be appointed by the railroad companies, one by each company; that the railroad companies shall have the right, at any time after 15 years, to purchase the depot property at the cost thereof; and the covenants, conditions, and stipulations set out in the contract are made binding upon the parties thereto, their successors and assigns, for 50 years from and after the depot shall be completed and ready for occupancy. Other provisions are made in respect of insurance and the appointment of depot officers, and the contract concludes with the stipulation that all of the covenants on the part of the parties of the second part are several, not joint, and in no event shall one railroad company be liable for any default of the others, or for more than its one seventh of the amount agreed to be paid to the first party.

The defendant the Rock Island Company became a party to this contract in 1880. Two other railroad companies were also admitted as parties thereto, one prior and the other subsequent to 1880; thus making 10 parties of the second part. These 10 companies all have the same rights, and the only effect of admitting these three companies was to lessen the

rental to be paid by each company from one seventh to one tenth of the whole rental. The defendant the Nebraska Company and the Chicago, Santa Fé & California Railway Company were the only railroad companies, not being parties to the depot contract, which ever entered and used this Union Depot. The governing board mentioned in the contract was organized in this way: Each railroad company, as it became a party to the contract, took an amount of issued stock equal to that taken by each of the other companies, and thus, as stockholder, had a right in the selection of directors. Each railroad company elected one member of the board of directors, and this board acted as the governing board. When the defendant the Rock Island Company became a party to the agreement it owned and operated a road from Chicago, in Illinois, to Cameron, in this state. It had acquired the right to run its trains from Cameron west to Kansas City over the road of the Hannibal & St. Joseph Railroad Company; but it did not then, nor does it now, own a track of its own between these points. The Hannibal Company was one of the original parties to the contract. The defendant the Nebraska Company owned and operated a line west of Kansas City, extending from Topeka, in the state of Kansas, west through that state and into Colorado. It owned no road from Topeka east to Kansas City, but had acquired a right to run its trains between Topeka and Kansas City over the road of the Union Pacific Company, which was also one of the original parties to the contract before mentioned. This right or lease from the Union Pacific Company did not give the Nebraska Company the right to use the depot at Kansas City. In May, 1886, the Nebraska Company leased its road, including the right over the Union Pacific road, to the St. Joseph & Iowa Railroad Company, for a period of 999 years, and it seems this last-named company then took possession of the property so acquired, and operated the road so leased by it. The Nebraska Company and the St. Joseph & Iowa Company, hereafter called the Iowa Company, were never admitted as parties to the depot contract, but it seems the president of the Nebraska Company made a temporary arrangement with the Depot Company, whereby it and its lessee, the Iowa Company, used the depot for a specified monthly rental. This rental was paid sometimes by one of these companies and sometimes by the other, down to the 1st of May, 1889. Prior to the last-named date,—that is to say, on the 1st January, 1889,—the Iowa Company sold and transferred its property, including the right of way over the road of the Union Pacific Company from Topeka to Kansas City, to the defendant the Rock Island Company. That company took posses-

sion of the property so purchased, and thereafter ran its trains from the east to Kansas City, and thence on west over this newly-purchased line, through Kansas and Colorado. The Rock Island Company gave the Depot Company notice that the rents before paid by the Nebraska Company would cease on the 30th April, 1889. The claim of the Rock Island Company is that it has the right, under the contract with the Depot Company, to use the depot for its western as well as for its eastern trains for the one rental. Other evidence was received for the purpose of showing the construction given to the contract by the parties thereto. The road of the Missouri Pacific Company, one of the original parties to the contract, was less than 400 miles in length at the date of the contract, but at the date of the trial that road had been extended, so that it was from 3000 to 4000 miles in length. That company transacts about 26 per cent of the business transacted at the depot. It pays no more rental than each of the other companies parties to the contract. The Kansas City, Ft. Scott & Gulf Railroad has extended its line from less than 200 miles to over 500. It takes the trains and cars of the Missouri, Kansas & Texas Railroad Company at Paola, in the state of Kansas, and hauls them to the depot at Kansas City, but pays no extra charge for the use of the depot. There is much other evidence of a like character.

1. The evidence shows beyond all question that these trains alleged in the petition to have been the trains of the Nebraska Company were in point of fact trains owned and run by the Rock Island Company. When the Rock Island Company became a party to the depot contract in 1880, its line terminated at the Kansas City depot. But by the purchase of the Nebraska Company property its line was extended on westward through the state of Kansas, and into the state of Colorado. The question, therefore, is whether it has the right under the depot contract, to the use of the depot for its trains now passing through Kansas City for the one rental. In other words, has it the right to the use of the depot for all its passenger trains, eastern and western, for the one rental? That it has such right, we think, is clear. By looking to this depot contract, we see the Depot Company agrees to procure the land and erect the proper structures for a depot sufficient to accommodate the business of the roads of the companies parties thereto; and, on the other hand, the railroad companies parties thereto agree to use the depot for all of their passenger trains destined for or departing from Kansas City, unless otherwise expressly permitted by the governing board. The chief object of the contract is to bring

Extension of
line after con-
tract—Rental.

the trains of the various roads to one common station, and thereby avoid the expense and delays incident to a number of depots, and to facilitate the transfer of passengers from one line to another. The subject-matter, and the entire subject-matter, of this contract is the proposed common depot; and as to this subject-matter the contract professes to and does fix the rights, duties, and liabilities of all parties thereto with detail and precision. The contract leaves each and all of the railroad companies free to extend their lines in any direction they may see fit. It is true that at the date of the original contract but one road of the several companies parties to the contract passed through and beyond Kansas City, but we are unable to find a single covenant which undertakes or seeks to make Kansas City a continued terminal point of any of the several roads. This is a subject as to which the contract does not deal. The railroad companies are left entirely free to extend their lines as they see fit, and in any direction that they may deem it to their interest. This is still the more apparent when we see that the compensation to be paid by each railroad company to the Depot Company for the use of the depot does not depend in the least upon the mileage of such road, or the amount of business which it transacts at the depot. Each company is left to extend its road and increase its business without additional charge. It matters not whether we look to the face of the contract or the construction placed upon it by the parties themselves. The result is the same, and that is this: that each railroad company party to the contract must pay the same amount for the use of the depot, without any regard whatever to the mileage of such road, or to the amount of business transacted by it at this depot. The Rock Island Company had the unrestricted right to extend its road through and beyond Kansas City, and the mere fact that it did so does not make it liable for any additional depot charges.

But it is argued that it is against the spirit and intent of the contract to allow the Rock Island Company, a party to the depot contract, to buy up an independent rent-paying line, and in this way deprive the Depot Company of the rents which it would otherwise receive, and at the same time deprive the railroad companies parties to the contract of the rents to which they are entitled under the contract. If the Rock Island Company had purchased a road belonging to another company, a party to the contract, the Depot Company would not lose the rental which the selling party had agreed to pay; and this is true whether we regard the contract of the selling company with the Depot Company as one running with the land in favor of the Depot Company or not.

The sale of the road belonging to one company to another companies, both being parties to the depot contract, would and could not affect the contrary rights of the Depot Company. So, too, the Depot Company would not be deprived of any contract rights which it had with the Nebraska Company at the time that company sold its property to the Rock Island Company. But the evidence does not show that the Nebraska Company or the Iowa Company had made any contract with the Depot Company for the use of the depot for any defined time. The Nebraska Company had applied for membership in the Depot Company, but the application had been postponed, and it had nothing more than a mere temporary permission to use the depot. It and its lessee, the Iowa Company, were under no obligation to any one to haul their cars into the Union Depot. They could discontinue the use of this depot at any time; construct and use a depot of their own. We do not question or controvert the proposition that the real intention of the parties to a contract should control the letter, and the strict letter may be abridged or enlarged so as to give effect to the intention of the parties as gathered from the whole instrument, and the contract may be read in the light of the circumstances under which it was executed. So, too, the law often implies duties and obligations from those which are expressed, and the implied duties and obligations are as much a part of the contract as those which are expressed. Bish. Cont. (enlarged ed.), § 241. But we cannot see that there is any implied duty on the part of the Rock Island Company, inconsistent with a right on its part to extend its line by the purchase of the Nebraska Company property; for the Nebraska Company was under no contract or other obligation to the Depot Company or any of the railroad companies parties to the depot contract to use the depot, or pay rent for such use. As before said, the Nebraska Company and its lessee, the Iowa Company, had a right, as against the Depot Company and the railroad companies parties to the depot contract, to quit the use of the depot at any time, and to construct and use their own depot or station-house. The Rock Island Company having purchased the Nebraska Company property, the trains on this newly-acquired extension became the trains of the Rock Island Company for all purposes, and the Rock Island Company is bound by the terms of its contract with the Depot Company to haul these trains into the common depot, and it has the right to the use of the depot for all of its trains, eastern and western, for the payment of the one rental.

2. Thus far we have assumed that the arrangement made by

the Nebraska Company for the use of the depot was a temporary use. But it is further insisted that there was at least an annual renting, so that the defendants are liable in any event for rents for the year commencing the 19th April, 1889. To an understanding of this issue it is necessary to state more in detail the evidence relating thereto. The Nebraska Company, by its president, made application for admission to the depot contract in August, 1887. This application, and that of three other companies, were considered by the board of directors of the Depot Company in October of that year, and the applications were all deferred, and of this action the Nebraska Company was duly notified. About this date the Nebraska Company made a temporary arrangement with the president of the Depot Company, whereby the former had the right to use the depot. The directors of the Depot Company passed the following resolutions at the following dates: January 10, 1888: "On motion, duly seconded, the action of the president in causing the Chicago, Kansas & Neb. Ry. to be billed for rent of depot and track privileges on the basis of one eleventh of 8 per cent per annum on the cost of the property, and one eleventh of operating expenses, taking an average of the last four years' expenses, was approved as a temporary arrangement." April 19, 1888: "That the Chicago, Santa Fé & California Railway Company and the Chicago, Kansas & Nebraska Ry. Co. be admitted as tenants to the use of the Union Depot Company's depot and tracks for an annual rental, based on 8 per cent of the cost of the property, and one twelfth (1-12) of the operating expenses under average established during the last four years." January 8, 1889: "That the Chicago, Santa Fé & California Railway Company and the Chicago, Kansas & Nebraska Railway Company be charged a rental each of one twelfth of 8 per cent of the cost of the property, and with one twelfth of the current expenses and taxes from January 1st, 1889."

The Nebraska Company did not at any time run its trains into the depot, but they were run in by its lessee, the Iowa Company, under the said resolutions. There is evidence to the effect that the Depot Company supposed they were the trains of the Nebraska Company. Monthly rent-bills were made out according to the resolutions, and forwarded to the Nebraska Company at Topeka. They were paid by the Iowa Company down to January, 1889. After that they were paid by the Nebraska Company down to the 1st May, 1889. That company then declined to pay them. Notice was given on the 30th of April, 1889, that the payment of these rent-bills would cease with that month. This notice came from the

Temporary
rental—Con-
tract from
year to year.

Rock Island Company, which had purchased this Nebraska Company line about the first of that year. We think there is evidence from which the jury could find that the Nebraska Company and the Rock Island Company had full notice of all these resolutions passed by the directors of the Depot Company, and we must therefore take it as a fact that they did have such notice. Now, the resolution of January 10, 1888, did nothing more than approve the temporary arrangement by the Nebraska Company with the president of the Depot Company. Thus far there is nothing but simply a license given to the Nebraska Company to use the depot temporarily; indeed, nothing more is claimed for this resolution. But the plaintiff does claim that the resolution of April 19, 1888, and the payment of rent thereunder, changed the temporary license to an agreement running from year to year until one party ended it at the close of a year; that, as the first year ended 19th April, 1889, and no notice of an intention to quit paying rents was given until the 30th of that month, the new year began, and must run to April 19, 1890. This resolution of April 19, 1888, standing alone, might perhaps lead to such a conclusion; but this resolution must be read in the light of what preceded and followed it.

In the first place, the Depot Company still had pending before it the application of the Nebraska Company to be admitted as a party to the depot contract. In the next place, this resolution, taken alone and literally, demands no more than annual payment of rents, while the evidence shows that rents were in fact demanded and paid monthly. This resolution does not state clearly what part of the 8 per centum on the cost of the property the two named companies are to pay. Its purpose seems to have been to change the rent from one-eleventh to one-twelfth, by reason of the fact that the Chicago, Santa Fé & California Company was then also allowed to use the depot. Again, the directors of the Depot Company could not have regarded this resolution as fixing the rent from year to year; for before the expiration of the first year they passed the resolution of January 8, 1889, fixing the rent on a different basis, namely, one-twelfth of 8 per cent of the cost of the property with one-twelfth of current expenses and taxes from January 1, 1889. This resolution says nothing about an annual rental. It was under this resolution that the rent was thereafter paid. It is our opinion that those resolutions were designed to do no more than declare the basis on which the monthly rent-bills were to be, and in fact were, made out. The payment of rent under them did not have the effect to create a contract running from year to year.

With this result it is not necessary to go over the other arguments made by the defendants on this branch of the case.

The judgment is affirmed. All concur.

Union Depot Companies.—See *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.* (Minn.), 50 Am. & Eng. R. Cas. 55; *Fort Street Union Depot Co. v. Morton* (Mich.), 47 Am. & Eng. R. Cas. 41; *St. Paul Union Depot Co. v. St. Paul, etc., R. Co.* (Minn.), 26 *Id.* 567.

STATE

v.

INDIANA & SOUTHERN R. CO.

(138 *Indiana*, 69.)

Requirement to Post Time of Arrival of Trains—Validity of Statute.—A statute which provides that "every corporation, company, or person operating a railroad within this state" shall post in a conspicuous place "in each passenger depot of such company, located at any station in this state at which there is a telegraph-office," a blackboard upon which "each company or person shall cause to be written," at least twenty minutes before the schedule-time for the arrival of each passenger train stopping upon such route at each station, the fact whether such train is on schedule-time or not, and, if late, how much, and prescribing penalties for the violation of the act, is not indefinite and inoperative as to corporations, for the reason that the word "corporation" is omitted in the designation of the parties required to make the specified statement on such blackboard.

Same—"Passenger Depot"—Scope of Term—"Station."—Although the said statute is awkwardly expressed, it is evident that it was intended that a board should be put up at every station where the trains stopped, if there was a telegraph-office at such stopping-place operated in connection with the railroad, receiving and giving information as to the time of the arrival and departure of trains; the word "station," as used in the statute, being synonymous with "passenger depot."

Same—Company Must Furnish Means of Observing Statute.—The said statute provides a penalty "for each violation of the provision of this act, in failing to report or in making a false report," such penalty to be recovered in a civil action, one half of which shall go to the prosecuting-attorney of the county, and the remainder to the common-school fund of the county. *Held*, that, although no penalty was imposed for failure to provide the blackboard, a company could not avoid the penalty for failure to make the required report on the ground that it was not compelled to hang a blackboard, and therefore had no means of giving the required information, since it was the duty of the corporation to furnish the proper means of observing the statute.

Same—Class Legislation—Invalid Objection.—The said statute could not be objected to as being class legislation, for the reason that it only applied to stations where there was a telegraph-office, because it applied to all of the same class of stations, and all roads might come within its provisions.

Statute not Prohibited by Constitutional Provision Making "Fines" Part of School Fund.—The provision of the constitution declaring that the common-school fund shall be derived from, among other things, "the fines assessed from breaches of the penal law of the state, and from all forfeiture which may accrue," does not contravene the provision of the said statute apportioning the penalty between the prosecuting-attorney and the school fund, since the constitution has reference to fines assessed in criminal proceedings only.

Attorney Interested—Fees.—It is not a valid objection to the said statute that it gives to the prosecuting-attorney an interest in the amount recovered.

Number of Penalties Recoverable under the Statute.—The statute does not limit the liability of a railroad company to a single penalty for a violation of its provisions; but a separate penalty may be recovered in regard to each train stopping at each station during each trip, either for failure to make the entry or for making a false entry.

Statute not a Regulation of Interstate Commerce.—The said statute is not invalid as attempting to regulate interstate commerce, from the mere fact that railroad companies to which its provisions are applicable may operate a line of railroad crossing the state boundaries, where such companies are only required by the laws to bring into use knowledge which they may have, or which is possessed by their servants situate in another state, as to the time of the arrival and departure of trains.

APPEAL from Greene circuit court.

W. C. Hultz and O. B. Harris, for the state.

John T. Hays, H. J. Hays, and P. H. Blue, for appellee.

OLDS, J.—This suit was brought by the prosecuting-attorney of Greene county, Ind., to recover penalties under an act of the legislature requiring persons and corporations operating railroads to place blackboards in conspicuous places at their stations, and write upon them the fact as to whether or not the trains stopping at such stations are on time, and, if late, how much. The complaint consists of numerous paragraphs. A demurrer was addressed to the complaint for want of facts, and sustained, exceptions reserved, and this appeal prosecuted, and such ruling assigned as error. The error assigned presents the question as to the validity of the statute upon which such action is based. Section 1 of the statute, approved March 9, 1889, reads as follows: "That every corporation, company, or person operating a railroad within this state shall, immediately after taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company, located at any station in this state at which there is a telegraph-office, a blackboard at least three feet long and two feet wide, upon which such company or person shall cause to be written, at least twenty minutes before the schedule-time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule-time or not, and, if late, Case stated.

how much." Section 2 provides "that for each violation of the provision of this act, in failing to report or in making a false report, such corporation, company, or person so neglecting or refusing to comply with the provisions of this act shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action to be prosecuted by the prosecuting-attorney of the county in which the neglect or refusal occurs, in the name of the state of Indiana, one half of which shall go to said prosecuting-attorney, and the remainder shall be paid over to the county in which such proceedings are had, and shall be part of the common-school fund."

Numerous objections are urged to the validity of this statute. Some criticism is made in regard to the wording of the statute, in that it is indefinite and inoperative, for the reason that it

provides that a "corporation, company, or person" operating a railroad shall place in the passenger depot of such "company" a blackboard, upon which such "company or person" shall cause to be written, etc. It is contended that, as it is a

penal statute, it must receive a strict construction, and that nothing can be supplied, as intended by the legislature, to determine its meaning, and therefore the statute does not apply to corporations, for the reason that the word "corporation" is omitted; the statute providing that blackboards shall be placed in the company's office, and that the company or person shall cause to be written upon the board, etc.

The further objection is made that the statute provides that the blackboards shall be placed in each passenger depot located at any station at which there is a telegraph-

office, and that a passenger depot is commonly understood to be a house for the accommodation

of passengers, while a station is a place such as a city, town, and intermediate way-stations where trains stop, so that if there is a telegraph-office in the city or town where the railroad company has a passenger depot, no difference to whom the telegraph-line belongs or by whom operated, or whether it has any connection with the operation of the railroad or not, yet at each passenger depot within such city or town there must be placed a blackboard, upon which shall be written the fact whether the trains are on time, and, if late, how much. It is true that penal statutes, as a rule, are to receive a strict construction, but this rule is not violated by adopting the sense of the words which best harmonize with the object and intent of the legislature, and the whole context of the statute must be construed together. Courts are to take a common-sense view of the statute, as a whole; and if by so doing, and giving to the words used a reasonable con-

Construction
of statute—
Omission of
word.

"Passenger
depot"—Term
defined.

struction, the object of the legislature can be definitely ascertained and carried out, the statute must be upheld; if not, it must fall. See *State v. Hirsch* (Ind. Sup.), 24 N. E. Rep. 1062. The draughtsman was careless in the use of language in constructing this statute. It might have been framed so as to have avoided the criticism urged, but we think the intent and object of the legislature is clear and certain, notwithstanding it is awkwardly expressed. It is manifest and certain that it was intended to require all persons, whether natural or artificial, who were engaged in operating a railroad in this state, to put up in a conspicuous place at each passenger depot provided for the use of passengers travelling upon such railroad, in connection with which depot there was a telegraph-office, a blackboard, and to enter upon such blackboard, at least 20 minutes before the schedule-time for the arrival of each train, the fact whether such train is on time or not, and, if late, how much. By "passenger depot" was not meant merely the station-house built for the accommodation of passengers, but the grounds prepared and used as depot-grounds for the benefit of persons travelling upon the particular railroad, and used by the company at such point in operating it as a common carrier of passengers. It is evident that it was intended that a board should be put up at every station where the train was stopped, if there was a telegraph-office at such point, at which office was received information as to the time of the arrival of trains at such stopping-place; and it is equally certain that it was not intended to require such notice written if there was not a telegraph-office at such place which received information as to the time of the arrival of trains. It is not essential that such telegraph-office should be in the house built for passengers; but if there is an office at such stopping-place, operated in connection with the railroad, receiving and giving information as to the time of arrival and departure of trains on such road, there would be a liability for failure to write the notice required by the statute. The word "station," as used in the statute, is used synonymously with the words "passenger depot," meaning the place, the grounds, and the buildings prepared for and used by the travelling public at such point in waiting for, taking, and leaving the trains, and by the company in operating the road at that point. As to just what constitutes a passenger depot or a station at a particular place is a question of fact.

It is next contended that as section 2 only provides a penalty for failing to report, or in making a false report as to whether a train is on time, or, if late, how much, no penalty can be incurred until a blackboard is put up, on which to note the fact as to whether the trains are on time or late, and,

if late, how much. We cannot concur in this interpretation of the statute. The plain and evident intention of the statute is that the object sought is to require the noting of the fact as to whether trains are on time or not, and, if late, how much; and the putting up of blackboards is a mere incident. Section 2178, Rev. St. 1881, provides a penalty for failing to sound the engine-whistle upon approaching a road-crossing, at a distance of not more than 100 nor less than 80 rods from such crossing; and section 4020 makes it the duty of railroad companies to have attached to each engine a whistle and bell. We do not think that the penalty of section 2178 could be avoided by a failure to comply with section 4020, in providing a whistle and bell for each engine; and yet, if the contention of counsel for the appellees be correct, railroad companies might, with impunity, run engines without any whistle or bell attached, and the persons in charge of the engines would not be liable to the penalty prescribed for failure to sound them. Section 4020, as originally passed (Acts 1879, p. 173), made it the duty of railroad companies to have attached to each and every locomotive engine a whistle, and made it the duty of the engineer or other person in charge of the engine, on approaching a road-crossing, to sound the whistle at a distance of not more than 100 rods nor less than 80 rods, and to continue to sound it until the engine passed the crossing. Section 2 of the act provided a penalty of not less than \$10 nor more than \$50 for a violation of the provisions of section 1. And this act was held to be constitutional in the case of *Railway Co. v. Brown*, 67 Ind. 45. Indeed, to hold the law under consideration void on the grounds contended for by counsel would be to hold that a party can avoid the penalty prescribed by the statute by a failure or refusal to comply with a duty imposed upon him by the same statute. In other words, the law makes it the duty of persons operating a railroad to put up blackboards at each station where there is a telegraph-office, and to note on the same the fact as to whether or not each train is on time, and, if late, how much, and prescribes a penalty for failure to note on the boards the fact as to whether or not each train is on time, etc.

The contention is that the penalty can be avoided by a refusal or neglect to perform the duty of putting up the blackboard, for the reason that this duty precedes the entering of the fact as to the time of the trains. We do not think a party can avoid the doing of an act, for the omission of which a penalty is prescribed by statute, by a failure to do what is necessary to be done in performing the act. If the act had made it the duty of all persons and companies

operating railroads within this state to enter upon a blackboard, in a conspicuous place, at each station where there was a telegraph-office, 20 minutes before the schedule-time of each train, the fact as to whether or not such train was on time, and, if late, how much, and prescribed a penalty for omitting to make such entry, the operators of railroads would have been compelled to have provided the means of carrying out the law and complying with its provisions. The imposing of the duty to do a certain thing carries with it the doing of such things as are necessary to perform the duty commenced. The statute, by making it the duty of persons or companies operating railroads to enter the fact as to the time of the arrival of trains upon a blackboard, in a conspicuous place, at the station, imposed upon such persons the necessity and burden of placing blackboards in conspicuous places; for they could not make such entries without doing so, unless they were already provided.

The duty of putting up blackboards would be imposed, if it were not specifically stated in the act. It is suggested that railroad companies might be compelled by mandate to put up the boards, and, when compelled to put them up, then they would be liable for the penalty for a failure to enter the fact required on the boards. If the theory of counsel is correct, this would not avoid the objection urged to the law; for if the argument be carried to its legitimate length, and the technical and strict construction contended for placed upon the statute, it requires that such company or person shall cause to be written, at least 20 minutes before the schedule-time for the arrival, etc., the fact whether such train is on schedule-time, etc.; and if there were blackboards up, it might then be said that it requires chalk or some other like substance to write upon the board, and there is no provision for compelling the company to provide chalk, and no penalty for failure to provide it, and, as it is necessary to have something to write with before you can write, a penalty could not arise for failure to write unless you had something to write with. We do not think statutes should be construed by such a technical rule. The object of the statute is to give notice to the travelling public as to whether or not the trains are on schedule-time, and, if late, how much, and for this purpose it makes it the duty of the company to enter the fact upon a blackboard at all important stations, and provides a penalty for failure to do so; and it is the duty of railroad corporations, companies, and persons operating railroads to provide the necessary means to comply with the law, and to comply with it, to avoid the penalty prescribed.

It is suggested that the statute is repugnant to the consti-

tution, on the grounds that it is class legislation, and only applies to stations where there is a telegraph-office. The law applies alike to all persons operating railroads, and to the same class of stations, and is uniform in its application. It does not designate at what stations the company shall maintain a telegraph-office. That is left to the discretion of the companies, to determine at what points along the line of the road it is necessary to maintain telegraph offices to properly operate the road and transact the business of the company. And the statute does not impose on the companies the burden of maintaining an office at points not necessary for the purpose of properly operating the road, but does impose the duty on the companies of designating the fact as to the arrival of trains at all points where it is necessary, and where they do maintain a telegraph-office in connection with the road, and this duty is imposed alike on all companies operating railroads. The court judicially knows that telegraph-lines are maintained, operated, and used in connection with railroads, and that it is necessary to do so, to properly operate a railroad and give advice as to the time of running of trains, and the arrival of them at certain points along the line, and in directing the running of trains and transacting the business of the road; that the use of the telegraph is general, and is necessary, in connection with a proper system, in operating a railroad. The fact that some company may operate a line of road by telephone or some other means of communication does not invalidate the law on account of class legislation; for the legislature has not seen fit or deemed it necessary to require this duty of any other roads except those operated by means of the telegraph, and to require the information noted when there is a telegraph-office at their stations. All roads may come within this rule, and all companies or persons that do operate a railroad by telegraphic information, and have stations at which there is a telegraph-office maintained, come within its provisions. We do not think the statute subject to the objection urged—that it is class legislation. *Hancock v. Yaden*, 121 Ind. 366-374.

It is further contended that the statute is in conflict with section 2, art. 8, of the constitution, providing that the common-school fund of the state shall consist of, and be derived from, among other things, "the fines assessed for breaches of the penal law of the state, and from all forfeitures which may accrue." In the case of *Burgh v. State*, 108 Ind. 132, a question very similar to this was passed upon, and decided adversely to the contention of counsel for appellee. The statute

Class legislation—Statute constitutional.

Application of fines to school fund—Statute not prohibited.

(section 6339, Rev. St. 1881) provided that: "If any person shall give a false or fraudulent list, schedule, or statement required by this act, he shall be liable to a penalty of not less than fifty dollars, nor more than five thousand dollars, to be recovered in any proper form of action, in the name of the state of Indiana, on the relation of the prosecuting-attorney. The assessor shall forthwith notify the prosecuting-attorney of such delinquency or offence, and he shall prosecute such offence to final judgment and execution; and such fine, when collected, shall be paid into the county treasury for the use of the county, and the prosecuting-attorney shall receive ten per centum commission on all moneys so collected and paid in, and a docket-fee of ten dollars, to be taxed and collected with costs in such action," etc.,—and it was contended that this section was in violation of said section 2, art. 8, *supra*. The court in that case says: "Section 2 of article 8 of the constitution provides that fines assessed for breaches of the penal laws of the state shall go into, and be a part of, the common-school fund. It is contended that, as the above section [6339] requires the penalty therein provided to be paid into the county treasury for the use of the county, it is in contravention of the above constitutional provision. The answer is that the constitutional provision has reference to fines assessed in criminal prosecutions, and the penalty provided in section 6339, *supra*, is not a fine in that sense. It is not to be recovered by a criminal prosecution, but by a civil action. At one place in the section the penalty is spoken of as a 'fine,' but the whole section shows that it is not a fine in the sense in which the word is used in the above section of the constitution." There is no difference in these two statutes, in so far as the penalty is concerned, for the violation of the act. Each provides a penalty collectible in the same manner; and, if the legislature may provide that it shall go into the county treasury for the use of the county, it may provide that it may go in any other direction, in so far as this provision of the constitution is concerned. If the constitution does not require that such penalty shall go into the school fund, then it may be made a fund for the payment for services of public officers.

It is urged that such provision prevents a due process of law, in that it gives to the prosecuting-attorney, the officer of the state charged with the prosecution of the action, an interest in the amount recovered. We do not think this objection tenable. It has been the long-established system in this state for the prosecuting-attorneys to secure a fee taxed against and recovered from the defendant in criminal prosecutions, and

Attorney interested—Fees

his fee depends upon the success of the prosecution. He is likewise allowed a commission for the collection of forfeited cognizance. There can be no difference, as regards the effect upon the officer, whether he receives a fee to be taxed against and recovered from the defendant, which depends upon the successful prosecution of the action, and allowing him a certain 10 per cent, or a certain portion of the amount recovered, as a compensation for his services. As to whether it is good policy to do either or not is a matter with the legislature. They have the right, as we think, to do either.

It is further contended that but one penalty can be recovered for the violation of the act. It seems to us that the statute is clear upon the subject. It provides

Number of
penalties re-
coverable.

"that for each violation of the act, in failing to report or in making a false report, such corporation, company, or person so neglecting or refusing to comply with the provisions of this act shall forfeit and pay the sum of twenty-five dollars, etc. The first section makes it the duty of persons operating a railroad, 20 minutes before the schedule-time for each passenger train stopping at a station where there is a telegraph-office, to note the fact as to whether such train is on time or not, and, if late, how much. This creates a duty to note the fact in regard to each train stopping at such station; and the second section creates a forfeiture for failing to enter the fact as to any passenger train stopping at such station; also creates a forfeiture for making a false report as to how much the train is late. Of course, if there is a failure to make any entry, there would be but one forfeiture as to such train; or, if there is a false entry, there would be but one forfeiture as to such train. There can only be one forfeiture as to one train at a particular station, during one trip, and that may be either for a failure to make the entry or for making a false entry, whichever may be the fact.

There is a further objection urged to the law, which is that the statute is void because it assumes to regulate interstate

"Interstate
commerce" —
Scope of term
— Validity of
statute.

commerce. This objection is stated by one of the learned counsel for the appellee as follows: "It applies, in express terms, to every corporation, company, or person operating a railroad in this state. It imposes penalties for the failure to give information when the same can only be obtained by the action of telegraph companies over whom such corporations engaged in interstate commerce have no control." The construction we have heretofore, in this opinion, given the statute, in so far as it refers to receiving information from a telegraph company over whom the company has no control,

avoids the objection urged. The statute was not intended to require the entry upon a blackboard where there was no telegraph operated in connection with the railroad, but at stations where there was a telegraph-office, in connection with the railroad, furnishing such information as the railroad company might desire in connection with the operation of the road. While the statute deals with persons and corporations engaged in interstate commerce, yet we think that the statute is a proper police regulation, which in no way interferes with interstate commerce, and is a regulation which is in no way sought to be exercised by the United States, and hence is within the power of the legislature of the state to enact. It simply imposes on the company or person operating a railroad the burden of ascertaining, in advance of the arrival of a train at a particular station, the time when it will arrive, and noting it upon a blackboard, for the benefit of the public. This is required to be done when the company or person possesses the information, and has the means within its power to convey such information to the point where it is to be noted. It is information possessed by the company itself, and requires only the command of the master to note it. The company or person operates the whole line of road. It is present at every point along the line, by its officers and servants. It knows at all times where its trains are, and what time they are scheduled to make, and this statute calls upon it to note the facts designated upon blackboards at certain stations in advance of their arrival. The statute simply commands the company to enter at stations in this state the information which it has the power of communicating at that particular point or station.

Counsel cite in support of their position the case of *State v. Woodruff, etc., Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, and quote from the opinion language holding that in matters of commerce between the states the power of the federal government is exclusive and supreme. Counsel thus state the proposition: That "this act imposes penalties on corporations engaged in interstate commerce for failure of telegraph companies to send telegrams from other states,"—and counsel, in support of their position, quote from the decisions of the United States Supreme Court in the case of *Telegraph Co. v. Pendleton*, 7 Sup. St. Rep. 1128, involving the validity of a statute of this state making telegraph companies liable for failure to deliver messages, in which opinion the court says: "In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed whenever that body chooses to exert its power, and it is also held that

the states can impose no impediments to the freedom of that commerce." And in that case the court further holds that, "whatever authority the states may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states." To the doctrine enunciated in these decisions, while we think it must be conceded some of the language used carries it to the border line, yet we readily yield our assent. But the cases referred to enunciated and applied the principles laid down in cases, where it involved the rights of the companies as exercised in the discharge of their duties while engaged in interstate commerce, or where the state sought to impose a penalty or tax operating as an impediment to the freedom of commerce, while in this case no such thing is sought to be done; this statute is but a police regulation within this state. The fact that the companies or persons required to carry out and comply with the statute are required to bring into use knowledge which they possess, or is possessed by other servants situate in another state, does not, as we think, impose any restrictions to the freedom of commerce. Indeed, the communication of the information possessed by the servants of the company at one point on the line of the road to those at another point on the line cannot, in itself, be termed "commerce," in the strict sense of the word. "Commerce," says Webster, "is the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic;" and it is defined in the Century Dictionary as: "Interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries or between different parts of the same country; distinguished as foreign commerce and internal commerce, as the commerce between Great Britain and the United States, or between New York and Boston; to be engaged in commerce;" and when existing or taking place between different states, or persons in different states, it is termed "interstate commerce."

One cannot trade or traffic or buy and sell with himself, though he act by or through his agent or servant; for their acts are all his acts, and all result to his benefit. One is not engaged in commerce by passing an article of merchandise from one of his hands to the other, or by having one of his servants pass it to another, although it cross the line between two states in the transit, though he may use the same hands and the same servants in the business of interstate commerce, Railroad companies are engaged in interstate commerce, be-

cause their railroads are used for the transportation and conducting of interstate commerce. Telegraph companies are held to be engaged in interstate commerce, as they convey information from citizens of one state to those of another. The railroad company and the telegraph company each occupy contractual relations with other parties in the transportation of articles of merchandise and information or news. One may possess a letter or other writing, deposited with his agent in another state, which may contain information which it is important for him to know in order to intelligently do an act or perform a public duty in this state. In such case, we think it cannot be said that he is engaged in commerce or interstate commerce if he go and get the letter, and bring it to this state, and avail himself of the information; and how can it be different in this respect, if he direct his agent to bring the writing to him? Nor is it interstate commerce, in the discharge of the duties of the master, where one servant conveys the information he possessed, which belongs to the master, to the other servant, even though it be conveyed through a third servant, whether it be a person or a telegraph company who acts as the servant of the master in conveying the information. As we have said, the statute is but a regulation for the benefit of the public.

It is held that parties, in crossing the track of a railroad company, must avail themselves of such knowledge as they possess in regard to the time of the running of trains upon the road. A party knowing a train is due at a time he is about crossing a track should use care to avoid injury. So this information to be noted on blackboards is as well for the persons having business across or about the railroad as for those who are travelling upon its trains. If it can be said that this legislation is repugnant to the constitution by reason of the fact that the information to be noted must be received from an agent in another state, through the agency of a telegraph company engaged in interstate commerce, so would legislation requiring signals to be given or watchmen to be kept at certain points upon the railroad, in case the superintendent who gave instructions as to the running of trains, and the manner in which they were to be run, resided in another state, and the direction to the agents or servants operating the road in this state must be communicated to them by means of the telegraph. In *Smith v. Alabama*, 124 U. S. 465, in speaking of the validity of state legislation relation to railroads, it is said: "The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points

of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provision of that law, from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce. It is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the constitution." While this statute may be on the border of legislative authority, yet we do not think it attempts to regulate interstate commerce, or to interfere with it, or that it places any impediments to the freedom of commerce, so as to render it invalid.

We have considered and passed upon all the material questions discussed in the case. While the statute is clumsily worded, yet we think its meaning and object are clearly apparent, and not subject to the objections urged against it. It is suggested that the blackboards should be put up immediately after the taking effect of the act, and that some of the violations are alleged to have occurred upon the day the act took effect, and there was no opportunity given to comply with the law. This is not an objection to the law. Possibly persons would have a reasonable time to comply with the act, in this respect, by putting up boards after it went into effect; but we do not intimate an opinion upon this question, as it is not before us. No objection is urged to the averments of the complaint.

The conclusion we have reached being adverse to the rulings of the circuit court, the judgment must be reversed. Judgment reversed, with costs, with instructions to overrule the demurrer to the complaint.

Time of Arrival of Trains—Notice on Blackboard.—In *State v. Kentucky & I. B. R. Co.* (Ind., Jan. 5, 1894.), 35 N. E. Rep. 991, it was held under the statute requiring railroad companies to have written on a blackboard, 20 minutes before the schedule-time for the arrival of a train at a depot, a statement whether the train is on time or not, and, "if late, how much," that if any such train covers its entire route in less time than 20 minutes, the practical operation of the statute cannot be applied to such train, or the company operating it; and that, if there are companies to which it cannot apply, it will be implied that the legislature did not intend to include such companies.

RICHMOND & DANVILLE R. Co.

v.

ELLIOTT.

(United States Supreme Court, May 1, 1898.)

Explosion of Defective Engine—Personal Injuries—Measure of Damages.
Future Expectations.—In an action against a railroad company by the employé of another company which used the defendant's yards, for personal injuries caused by an explosion of the boiler of an engine belonging to the defendant company, it was reversible error to allow the plaintiff to testify as to his prospects of advancement in the employment of the railroad company, where there was no recognized rule of promotion among the employés of the said company, but his increase of wages after a certain length of time was a pure matter of speculation.

Same—Duty of Company to Test Engine.—Where the testimony showed that the engine was properly and carefully handled, and that the explosion of the boiler occurred by reason of a defect which could not, with the exercise of reasonable care, have been discovered by the company, and that the company took all reasonable care to discover defects by applying the tests usually applied to discover the capacity of boilers, it could not be held guilty of negligence in causing injury to the plaintiff, a stranger to the company, because of the explosion resulting from a latent defect.

IN error to the U. S. Circuit Court for the northern district of Georgia.

On February 8, 1887, defendant in error commenced this action in the Superior Court of Fulton county, Ga., to recover damages for personal injuries. The case was removed to the Circuit Court of the United States for the northern district of Georgia, in which court a trial was had on the 2d of November, 1888, and a verdict returned in favor of the plaintiff for \$10,000. Judgment having been entered thereon, defendant sued out a writ of error from this court.

The facts were these: The plaintiff was an employé of the Central Railroad & Banking Company, which company had, under an arrangement with the defendant, the right to use its yard in Atlanta, Ga., for switching purposes, and in the making up of trains. He was one of the crew of a switch-engine belonging to the Central Company, and on the night of November 25, 1886, while in the discharge of his duties in the yard, engine No. 515, belonging to the defendant, exploded its boiler, and a piece of the dome struck him on the leg, and injured him so that amputation became necessary. The explosion of the boiler was charged to be owing to negligence on the part of the defendant in this respect: "That more

steam was allowed to generate than the engine had capacity to contain;" that the boiler was defective, and that the defendant had notice of the defect.

Henry Jackson, for plaintiff in error.

C. T. Ladson, for defendant in error.

BREWER, J.—The first question to which our attention is directed arises on the admission of testimony in respect to the probability of plaintiff's promotion in the service of his employer, and a consequent increase of wages. It appears that he was working in the capacity of coupler and switchman for the Central Company, and had been so working for between 4 and 5 years; that he was 27 years of age, in good health, and receiving \$1.50 per day. He was asked this question: "What were your prospects of advancement, if any, in your employment on the railroad, and of obtaining higher wages?" In response to that and subsequent questions he stated that he thought that by staying with the company he would be promoted; that, in the absence of the yard-master, he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employes of the company of a higher grade of service than his own; that there was a "system by which you go in there as coupler or train-hand, or in the yard, and, if a man falls out, you stand a chance of taking his place;" and that the average yard-conductor obtained a salary of from sixty to seventy-five dollars a month.

Injury by
boiler explosion—Measure
of damages.

We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that, when a vacancy took place, a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment; but that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment, or even whim, of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man; and a jury, in estimating the damages sustained, will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exagger-

ating in the minds of the jury the amount of damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing (*Wade v. Leroy*, 20 How. 34; *Nebraska City v. Campbell*, 2 Black, 590; *Railroad Co. v. Putnam*, 118 U. S. 545, 554, 27 Am. & Eng. R. Cas. 291), the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go, and introduce testimony which simply opens the door to a speculation of possibilities.

Nor was the error in the admission of this testimony cured by the instructions. On the contrary, they seem to emphasize that this chance of promotion was a matter to be considered. This is what the court said: "I permitted some evidence to be introduced on the subject of the line of promotion in the business in which he was engaged. The plaintiff says, and the jury could consider the fact, that he had a probability of promotion in the line of services in which he was engaged; that the salary of the next grade of services in which he was engaged is from sixty to seventy-five dollars per month. The jury can consider that in finding what his financial or pecuniary loss is. I have permitted the evidence to go to the jury, and I will state to you that the jury ought not to be governed by a mere conjecture or possibility in a matter of that sort. It ought to be shown to the reasonable satisfaction of the jury that the man, after a while, would earn more money than he was then earning. It ought to be shown to your reasonable satisfaction. It is a matter for you to determine. The evidence has gone to you, and if you believe—if it has been shown to your reasonable satisfaction—that this man would earn more money at some future period, you would be authorized to consider that fact." Obviously, this directs their attention to this matter, and invites them to consider it in determining the damages which the plaintiff has sustained. While it does say that the jury should not be governed by any mere conjecture or possibility, yet it speaks of the matter as though there was placed before them a probability of promotion which they ought to consider. That probability was only such as was disclosed by the testimony we have referred to. Such an uncertainty cannot be made the basis of a legal claim for damages. The Code of Georgia of 1882 (in section 3072) declares: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing

the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." Such declaration is only an affirmation of the general law in respect thereto.

A case very much in point was before the Supreme Court of Georgia. *Railroad Co. v. Allison*, 86 Ga. 145, 48 Am. & Eng. R. Cas. 101. In that case the plaintiff (the action being one for personal injuries) was a postal clerk in the railway mail-service of the United States, and on the trial the assistant superintendent of the railway mail-service, under whom the plaintiff was employed, was permitted to give testimony as to the chances of promotion. This was adjudged error. The court thus discussed the matter: "We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from \$1150 to \$1300 too remote, to go to the jury, and for them to base a verdict thereon. While it is proper, in cases of this kind, to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and, if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the *personnel* of the court, upon which such appointment must depend, might change it in the mean time. To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received, which is merely in expectancy and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong and unjust to the defendant. We believe the rule of most of the railroads in this state is to promote their employes. An employé commences at the lowest grade, and, if he is competent, capable, and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of

promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary, which he never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them in case of vacancy, and promoted above them; so it could not be said that he was in direct line of promotion."

And this decision is in harmony with the general course of rulings. *Brown v. Cummings*, 7 Allen, 507; *Brown v. Railroad Co.*, 64 Iowa, 652; *Chase v. Railroad Co.*, 76 Iowa, 675, 38 Am. & Eng. R. Cas. 148. For this error, which it may well be believed worked substantial injury to the rights of the defendant, the judgment will have to be reversed.

Another matter is this: The injury was caused by the explosion of the boiler of an engine, and it is insisted that the testimony shows that the engine was handled properly and carefully; that the defect in the iron casting of the dome-ring, which, after the explosion, was found to have existed, was a defect which could not, with the exercise of reasonable care, have been discovered by the company; and that it took all reasonable and proper care to test the boiler and engine, and from such test no defect was discovered. Hence the contention is that the court should have instructed the jury to find a verdict for the defendant. Perhaps, in view of what may be developed on a new trial, it is not well to comment on the testimony in respect to these matters. Whether there was negligence in respect to the accumulation of steam is a question of fact, involving, first, the capacity of the boiler, the amount of steam which had accumulated, and the precautions which were taken to prevent its going above a certain pressure.

With regard to the defect in the iron casting, which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be,

Duty to examine engine.

and doubtless often is, his duty, when placing the machine in actual use, to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company, after purchasing this engine, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot, in an action by one who is a stranger to the company, be adjudged guilty of negligence because there was a latent defect—one which subsequently caused the destruction of the engine and injury to such party. We do not think it necessary or proper to go into a full discussion of the facts, but content ourselves with stating simply the general rules of law applicable thereto.

For the error first above noticed the judgment will be reversed, and the case remanded with instructions to grant a new trial.

Reversed.

Action for Personal Injuries—Evidence of Plaintiff's Prospect of Promotion for Purpose of Increasing Damages.—See *Richmond & D. R. Co. v. Allison* (Ga.), 48 Am. & Eng. R. Cas. 101; *Chase v. Burlington, C. R. & N. R. Co.* (Iowa), 88 Am. & Eng. R. Cas. 148.

Negligence in Use of Appliances—Complaint—Duty of Parents to Guard Children.—In *Louisville, N. A. & C. R. Co. v. Shanks*, 182 Ind. 395, which was an action for personal injuries, the complaint alleged the negligence of the defendant in overloading a baggage-truck and placing it so as to obstruct a public sidewalk; that the truck could not be passed without taking hold of it; and that, while the plaintiff, a child seven years old, was passing along the sidewalk, the truck fell on her without her fault. The court charged that if the truck was carelessly loaded by another company and placed across the sidewalk, and was there received by the defendant's employes and allowed to remain in such position, and the plaintiff in passing touched the truck, causing it to fall, then the defendant was liable. *Held*, that there was not a variance between the complaint and the instructions sufficient to justify reversal. In this case it was also held that it was not error to refuse to charge the jury that parents of young children should exercise care over them, "in proportion to the danger to be avoided, and the fatal consequences involved in its neglect." The court said: "Parents of children of tender years must use care proportioned to known dangers, or dangers that might be known by the exercise of ordinary diligence and prudence; but parents are not bound to guard their children against unknown dangers, or dangers that ordinary diligence and prudence would not make it their duty to know. The words 'and the fatal consequences involved in its neglect' add an element to the duty of the parent which the law does not impose upon them."

ILLINOIS CENTRAL R. CO.

v.

FOLEY *et al.*

(U. S. Circuit Court of Appeals, Eighth Circuit, Dec. 6, 1892,
53 Fed. Rep. 459.)

Defective Premises—Railroad Bridge—When Part of Depot-grounds.—
A railroad bridge near a station was so situated that, when an engine was stopped for taking water at the station, a shipper of live-stock, who was accompanying his cattle, was compelled to pass around in front of the engine and over the bridge on which the engine was standing, in order to look after his stock. It frequently happened that travellers were compelled to leave a passenger-train on the side of the bridge opposite the station while the engine was taking water, as the train would not again stop at the station. *Held*, in an action against the railroad company for the death of a shipper who fell from the bridge in the night-time while passing around the engine to get at his stock, that the question of liability of the company was for the jury to determine, with the understanding that the company would be liable if the said bridge could properly be considered as a part of the depot-grounds, and a verdict to the effect that the defendant was liable by reason of not maintaining a railing on such bridge would not be disturbed.

IN error to the U. S. Circuit Court for the northern district of Iowa.

This is an action brought by M. J. Foley and Nora M. Kelley, administrators of the estate of M. B. Kelley, against the Illinois Central Railroad Company, to recover damages for the death of the intestate, M. B. Kelley, which it is alleged was brought about by the negligence of the railroad company.

On March 18, 1890, M. B. Kelley, the owner, delivered at Manson station, in Iowa, to the Illinois Central Railroad Company, for transportation over its road to Chicago, eight carloads of live-stock. The train carrying this stock was what is known as a "special stock-train," which runs through to Chicago with all convenient speed, and makes no stops except for coal and water. Shippers of live-stock are required, by a regulation of the railroad company, to take care of their stock while in course of transportation, and for that purpose they, or their agents, are required to accompany the train that carries the stock; and they are expected to look after and care for it when the train stops for coal and water. The train hauling Kelley's stock consisted of 17 cars. The total length of the train, including the engine and tender, was about 650

feet, and Kelley's stock was in the first 8 cars, counting from the tender. Kelley, with a helper, Mulroney, was on the train to look after his stock. At Dubuque, a steer in the car next to the engine was seen to be down. Between 8 and 9 o'clock at night the train reached Council Hill station, in Illinois, where freight-trains going east commonly take water; and this train stopped there, in the accustomed place, for that purpose. The conductor told Kelley the train would stop five minutes, and that he would have time to look after his cattle "if he hurried up;" and, just as the train stopped, Kelley, with a prod and lantern, and his helper, with a stick, got off on the south side of the track, and hurried toward the head of the train to look after the steer that was down in the car next to the tender. The conductor saw them start, and knew their business was to look after the stock. When they got to the front end of the car, next to the tender, Kelley gave the lantern to his helper, and told him to go around on the other side of the car, and hold the light up so he could see the cattle. The helper took the lantern, and started to walk around in front of the engine, as directed, and what befell him is thus told by himself:

"Just as I got in front of the engine, it kind of started, and the steam kind of went off, and I had the impression that the engine was about to start. I stopped. The light was in my hand. The thought came to my mind, what would I do—go back or forward; and, without giving it a second thought, I stepped over the north rail. I saw nothing but black. I was looking toward my feet. I took one step, and I was in the air. The next I remember was seeing Mr. Kelley beside me, dead. I knew it was he, for some reason or other. My recollection is, I was sitting in the water, his body a few feet from me. It must have been a headlight that gave me the view. I do not know how long I was there. I was only conscious a few seconds. Don't know when I was taken out. I remember of making a noise—a kind of loud groan. The next I recollect I was lying on a cot in Passamore's store. Before I fell, I could see nothing but just black. It looked beyond the rail just like the rest of the place—nothing but darkness. There was no guard-rail or obstruction to prevent my going over. I passed across the track, ahead of the nose of the engine, a few feet. When I stepped over the rail, there was no steam; I had passed that. The headlight was there, but it didn't show me anything at my feet. The headlight struck about my shoulders, I should think. It did not enable me to see. Was holding lantern in right hand, and had a prod with me. When Kelley said we would go to the head of the train and work back, the conductor was right there. After I left

Mr. Kelley, to go around the engine, I did not know by touch, feeling, or sight when I struck the bridge. I had a pair of rubbers on. Mr. Kelley had also rubbers. I saw him put them on. When I saw Mr. Kelley last, he was at the back of the tender, at the end of the head car. When he gave this direction, I turned right around and left him. I have no knowledge how Mr. Kelley came around there—only supposition."

It appears from the evidence that there is a bridge running east and west, 122 feet long, over a stream at this station, and that the front end of an engine going east, when it is taking water, extends 30 feet onto this bridge, from the west end thereof. The main track and switch pass over the bridge, which is planked between the two tracks and between the rails, and there is a narrow planking outside of the north rail of the main track, which extends about 30 feet from the west end of the bridge, and is used by the employes while oiling the engine, but there is no planking beyond this point on the outside of the north rail of the main track, and no guard; and one passing around the engine from the south to the north side would, as soon as he stepped over the north rail of the main track, be precipitated to the rocky bed of the creek, a distance of 17 feet. This is just what happened to Kelley and his helper; the fall killing the former, and seriously injuring the latter. The distance from the west end of the bridge to the depot is 229 feet. The water-tank is between the depot and the bridge, the centre of the tank being 20 feet from the west end of the bridge. The depot platform extends nearly to the water-tank, and all the buildings and facilities for business at the station are between the bridge and the depot. The evidence shows that freight-trains going west that carry passengers take water at this tank and do not always pull up and stop at the depot to let the passengers off, but that the passengers have to get off on the east side of the creek and cross the bridge to reach the depot; and passengers purchasing tickets for freight-trains are sometimes sent across the bridge by the station-agent to take the caboose. Passengers on freight-trains going west get off where the caboose happens to be when the engine stops to take water. The customary method of proceeding at night, where there are two men looking after cattle, is for one of them to hold the lantern and the other to use the prod, and when a steer is down near the end of the train, it is usual for one of them to go round the nearest end of the train, whether it be the engine or caboose, with the lantern, to enable the other to look through the car and do his work. The night was so dark and misty that a lantern shed light but a very short distance.

One witness testifies that, with a lantern and a torch or two, "we could not see to distinguish anything outside of the little space around us."

That part of the charge of the court relating to the material issue in the case was as follows: "It seems to me, gentlemen, that the main question for your consideration in this case is as to the use expected to be made of the bridge and as to its condition. Was this bridge at Council Hill a place where, as the business of the company was ordinarily carried on, it should reasonably have been expected and foreseen by the company that when stock-trains would stop at the water-tank, for the purpose of taking water for the use of the engine, the men engaged in looking after the stock would naturally go upon the bridge when thus employed? Was such a use, in fact, made of it? It is for you to say, under the evidence, whether or not that bridge was or was not such a part of the Council Hill station-grounds, in the use that was made of it, as that the stockmen, including Mr. Kelley, when transporting cars of stock over that line of railway, had a right to go upon the bridge when they were called upon to go about the train of the company for the purpose of examining their stock. The evidence shows that when the engine is placed in position at the water-tank, so that water can be taken, it will extend some distance on the bridge; and, of necessity, persons seeking to pass around the front end of the train, thus placed, must go upon the bridge.

Now, under these circumstances, was that bridge a part of the yard or premises of the company, so that the company should have reasonably foreseen that stockmen would use it when examining their stock in the train? And were or were not such stockmen, including Mr. Kelley, justified by the practice of the company in making use of the bridge as part of the yard of the company when looking after their stock? If, by the usage of the company, they were justified in using the bridge as part of the premises of the company, where they were expected to go in examining their stock, then the duty rested upon the company of exercising ordinary care to put and keep the bridge, as part of the company's yard, in a reasonably safe condition for the use of parties engaged in shipping stock over defendant's line of railway. If, however, the bridge did not form part of the station-grounds, and the company did not hold it out to the public as a place to be used for the purpose for which Mr. Kelley used it, then you cannot hold the company responsible for the consequences resulting from it being so used by him, because in that case the company would owe him no duty or obligation to keep the bridge safe for such use. If, however, you find that the

bridge was a part of the defendant's premises at Council Hill, which Mr. Kelley was justified in using, under the instructions given you, when engaged in examining his stock, and that he was justified in endeavoring to pass around the front end of the engine, in the position in which it was placed, then the next question will be as to the condition of the bridge for such use. As I have already said to you, the rule on that point is that the company is required to use ordinary care—such a degree of care as men of ordinary prudence should exercise where human life or limb may be exposed to danger—in keeping its premises, where the public are invited to come in transacting business with the company, in a reasonably safe condition, so that in the use thereof no unnecessary risk or danger is cast upon the public.”

There was a verdict and judgment for the plaintiffs, and the defendant sued out this writ of error.

John F. Duncombe, for plaintiff in error.

A. N. Botsford, M. F. Healy, and Thomas D. Healy, for defendants in error.

CALDWELL, J.—It is assigned for error that the court refused, at the close of the whole evidence, to give a peremptory instruction to the jury to find a verdict for the defendant. The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had, upon any view which could be properly taken of the facts the evidence tended to establish. *Railroad bridge—When construed to be on depot-grounds.* *Railway Co. v. Cox*, 145 U. S. 593, 606. We think the evidence tended to establish that the bridge was a part of the station-grounds, and used as such by the railroad company, and by those having business with the company or its trains at the station, and that the company knew, or ought to have known, that shippers of stock, accompanying its freight trains, would have occasion to go upon the bridge, in going around the train to look after their stock, while the engine was taking water at the tank. If these were the facts, the company was undoubtedly guilty of negligence in not planking the bridge on the north side of the main track and placing proper guard-rails around it, or taking other suitable means to guard against accidents like that which instantly killed Kelley and came near killing his helper. The charge contained a very clear and accurate statement of the rules of law applicable to the case; and the court properly left it to the jury to say, whether, applying these rules to the facts and circumstances of the case, the defendant had been guilty of negligence. It was emphatically a case where the question of negligence was one

for the determination of the jury, under proper instructions from the court. That the evidence tended to establish negligence was enough to make it the duty of the court to submit that issue to the jury. Where negligence may be fairly deduced or inferred from proved or conceded facts, the case must be left to the jury. Neither this nor any other court can set aside the verdict of a jury simply because the court would have reached a conclusion different from that of the jury, upon the facts. To do so would be to usurp the functions of the jury.

In a case involving questions of negligence, the supreme court, speaking by Mr. Justice MILLER, said: "But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these, as well as others." *Jones v. Railroad Co.*, 128 U. S. 443-445. And in the case of *Railway Co. v. Ives*, 144 U. S. 408, 417, the court, speaking by Mr. Justice LAMAR, says: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law, for the court."

In the case of *Railroad Co. v. Stout*, 17 Wall. 657, 663, 664, we think the evidence of negligence was not so strong as it is in this case, and the court said: "The evidence is not strong, and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided, if acting as jurors. * * * Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard—the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is as

sumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding, in the case before us, that although the facts are undisputed, it is for the jury, and not for the judges, to determine whether proper care was given, or whether they establish negligence."

And see *Railway Co. v. Jackson*, L. R. 3 App. Cas. 193, 47 Law J. C. P. 303; *Railway Co. v. Slattery*, L. R. 3 App. Cas. 1155. In Pollock on Torts (page 381), the learned author says: "The tendency of modern rulings of courts of appeal has been, if not to enlarge the province of the jury, to arrest the process of curtailing it."

It would serve no useful purpose to set out in detail all the evidence in the record, and point out wherein it is sufficient to support the verdict of the jury. It is enough to say that we have carefully considered it, and that, in the light of the authorities we have cited, the question of negligence was properly left to the consideration of the jury, whose verdict is not without evidence to support it.

The judgment of the circuit court is therefore affirmed.

GILMORE

v.

PHILADELPHIA & READING R. Co.

(154 Pa. St. 375.)

Defective Station Premises—Repairing Bridge—Independent Contractor.—Where a bridge leading to a railroad station is being repaired for the company by independent contractors, the railroad company is liable for the death of a person who falls through an opening in the bridge while passing to the station to purchase his ticket, where the work of repair has been nearly completed, so that the company had begun to use the bridge as a passageway for people passing to and from its station.

APPEAL from Philadelphia court of common pleas.

The following was the instruction to the jury: "This case, which was tried yesterday, is probably fresh in your memory, and it will not be necessary for me to refer in any extended manner to the features of the case in order to recall them to your mind. The plaintiff is the widow of a man who, it is alleged, met his death by reason of falling through an opening which existed in the railing at or about the head of a flight

Repair of
bridge—Duty
of company.

of stairs leading down from the highway to the platform of this railroad station, which belonged to, and was under the control of, the defendant railroad company. It is claimed that it was the duty of that company to close up that opening, or in some way to warn people who were there in the neighborhood of the opening, and had a right to be there, so that they would not be without knowledge of it, and would not be likely to fall through it the considerable distance which there was between the level of the highway and the level of the platform below. It appears that work was being done at this point whereby there was a change being made from what had been a previously existing condition of things to that which it was desired to accomplish. Although there has been no absolutely clear evidence upon the subject, so far as I remember, I should infer from what has been said that the fact was that, previous to the beginning of this work, an iron railing which ran along the side of the bridge which crossed the track at this point on Fayette street extended beyond the point at which we have heard so much, where nineteen inches or thereabouts of a gap existed to where the staircase was before, a few feet further on—six, eight, or ten feet; and naturally, if that was the case, you would suppose and infer that when this work was undertaken, and the contractors were placed in charge of it, and undertook to put in new steps, that railing was taken away. When the posts for the covering were placed, it appears that this gap was left; and I understand, and that is the natural explanation of it, that in that way there came to be this space of eighteen or nineteen inches which had not existed before, and which when the work was done, or at a proper time in the doing of the work, it became the duty of somebody to fill up in such a way that those who were there lawfully would not be liable to fall through it, and receive serious and perhaps fatal injury.

“Now, although the contract which was made between the defendant company and the firm of Hathaway & Co. did not provide by express reference for that portion of the iron railing, I think it is the natural construction of the language of the contract to infer that it became the duty of the contractors, by virtue of that contract, to put in the iron-work which was necessary to complete their work. This was work which was being done adjacent to what, perhaps, was the highway itself. It is a little difficult to tell from the photographs which have been produced, and which you will have out with you, exactly what the relation of that place was to the highway, but it was contiguous to it, whether it was upon it or not. It was very near it, just at the edge of it, if it was not upon the highway proper. I mean the public highway, un-

der the control of and belonging to the municipal corporation.

"Now, my view of this case, upon the legal point that has been raised, is that while that work was in progress, and before the railroad company had undertaken the use of the steps, so as to have upon their part an individual and direct responsibility to those who were using them, the contractors, Hathaway & Co., having charge of the work, and having full charge of the work, were independent contractors, and that any negligence was their negligence; any negligence to which the defendant did not contribute directly was negligence for which they only would be responsible, and not the railroad company. If this accident had occurred while that work was in general progress, and before the railroad company had undertaken any use of this stairway, while the old stairway was in use, I should be inclined to instruct you that, if you believed that such a contract was made as has been referred to, about which there can be no dispute—if you believe that this work was then in progress, and that the railroad company had not the care of, or was not using, and had not taken to itself the use of, the steps, and thereby the responsibility, so far as it existed, of looking after the welfare and safety of those who were using them—then the railroad company would not be responsible.

Duty of contractors.

"I think, however, that a different liability may properly arise in this case, in view of the fact that the work had been, according to the evidence of the witnesses, practically, or rather very nearly, completed; that the old steps had been abandoned and taken away, and that the new steps had been in use for a day or two. I do not recall now positively whether the new steps were first used and the old steps abandoned on the Saturday preceding the accident, or on the Friday, and probably it is immaterial, so far as that is concerned. Previous to this accident, however, it appears that the railroad company had opened that passageway, and had permitted it to be used by those who were engaged in business relations with it—those who were passing through to the station and from the station. They had undertaken in that way, according to my judgment, the ordinary responsibility which would rest upon such a company as this railroad company, by reason of constructing a convenient passageway for its own advantage, as well as for the convenience of those who would have relations with it. If you believe that to be the case, then it seems to me that the railroad company became responsible, as it ordinarily would if there had been no contractor whatever, and if all in the case which relates to that subject were out of it;

that it became responsible for using due and proper care for the protection of those who, by reason of the construction of this access to its own premises, were placed in circumstances of danger.

"Now, if that is so, and such I express to you as my judgment upon the legal question bearing upon this point, in that case did the railroad company exercise the proper care which it should have done in the case which is now before you? It was only bound to exercise such care as, in view of the circumstances existing—in view of the perils which would attend anybody who might fall through the opening in the railing—would be considered prudent care. There was an opening, according to the evidence, of eighteen or nineteen inches in width. It was an opening which led out to a sheer fall of about thirteen feet, if I remember the testimony; at any rate, it was a considerable fall. Now, what ought the railroad company to have done? It would have been a perfectly natural thing to say, and a perfectly natural conclusion to reach, that, in view of the position of that opening at the very top of the stairs, where people were coming up, if they were not warned of it, and were not aware of the fact that it existed, being perhaps engaged, as people are, in conversation, stopping, halting, and carrying on conversation in a careless, or rather in a thoughtless way, such as many people do, not having any reason to expect danger—I say, if it was such an opening as such people might and easily could fall through, then you would say that it was the duty of the railroad company to see that it was closed, or that some warning was given; so that those who were there in that position, engaged in such use of that part of the street, or that portion of these steps—the top-most step—would be prevented or warned against risk or injury which would be likely to occur.

"The testimony is that on Saturday afternoon there was a strip of wood put across that opening—a strip, perhaps, of flooring, driven into the end of the iron rail, and then tied to the wooden post. I presume that, upon the evidence, you will not doubt but what that was done. There are witnesses, apparently credible, several of whom speak of their having constructed it and having seen it there. In my mind I have no doubt whatever that it was put there, and, if it had remained there, I think you ought to come to the conclusion that that was sufficient. It was not as effective as a railing running from the floor up, but it was such a guard as to a person in the ordinary use of his faculties would have been sufficient to warn him. This being unfinished work, of course you naturally would not apply the same standard to it that you would to a case of finished

Duty to fence
opening.

work ; and, besides that, you must remember that you have not, as was said during the progress of the trial, the case before you of anybody who would have passed through this opening under the strip of wood. This was a full-grown man—a man who, in the position in which he was, if the strip was there, would have been warned by it, and prevented by it, in all probability, from falling through. Now, did that strip remain there ? If it remained there until the time of the accident, or about the time of the accident, I should think the railroad company was relieved of all responsibility, because it would make no difference whether it was a direct employé of the railroad company, or whether it was some one in the employ of the contractors who put it there. If it was put there and remained there down to or about the time of the accident, the railroad company must be regarded as having done, either directly or indirectly, all that it was bound to do, because you cannot apply an unreasonable standard to a railroad company, any more than you can to an individual, in determining the question of what their obligations are. If, however, that strip was removed the day before (this accident occurring on Sunday), if that strip was removed on Saturday, was absent on Saturday evening, and remained absent all day Sunday—as to which you may have no direct evidence, though you have evidence that it was not there Saturday evening, and evidence that it was not there Sunday evening, when the accident occurred, with no evidence covering the whole period of time between Saturday afternoon and Sunday evening which would enable you to state whether or not it was there portions of the time—it would not be an unreasonable inference for you to draw, if you believe the witnesses who say that it was not there Saturday evening, and that it was not there Sunday evening, that in some way which you cannot account for, and probably nobody else, it disappeared before Saturday evening at the time when it was seen not to be there, and was not replaced down to the time when the accident occurred. That would be a perfectly natural and proper inference to draw, as it seems to me. Now, what ought you to infer ?

“ It seems to me that, if you regard this opening as one of serious character at such a place as ought to have warned those in charge of the railroad company's premises at that point that it was dangerous—in other words, if, with due regard to those who were using the highway at that point, and were passing up and down the steps, you believe that opening should have been closed, and should not have been permitted to remain—then I think you will have to pass upon the only other question which remains, as it seems to me—upon the subject of negligence ; and that question is whether, in view

of all the evidence in this case, it was permitted to remain open for such a length of time as would necessarily lead to the conclusion that it should have been observed by those in charge of the railroad company's property there, and that it should have been in some way closed, so that persons would not fall from it, in the natural and proper use of the highway or the railroad company's conveniences at that point. There might have been something put in which would have been sufficient to act as a warning or as an obstruction. If you think that leaving that place unguarded, and permitting that opening to stand for the whole of the day, if it did for so long a time, shows that those in charge of the railroad company's premises there were negligent, that they did not do what they ought to have done, and what reasonable men would have done, what was required of them in the exercise of their rights and their privileges, then you would naturally infer, and you would properly infer, that there was negligence in the case, for which the railroad company should be held responsible. Of course, it follows from all this, and I have said it by implication, if not directly, that if you shall be of the opinion, upon the whole evidence, that the railroad company, its employés (those in charge of its premises at that point), were not guilty of any want of that fair, reasonable, and proper care which, under the circumstances, they should have exhibited for the protection of those who were using the highway at that point, then your verdict ought to be in favor of the defendant company, and it should be rendered just as cheerfully in that case for them as, on the other view of the case, it should be rendered in favor of the plaintiff. If you decide that question in favor of the railroad company, that is an end of the case, and your verdict should simply be for the defendant. If, however, you shall be of the opinion, in view of what I have said to you, that the railroad company was negligent—negligent by reason of the negligence of those who were responsible for the exercise of its rights and responsibilities for meeting its obligations at that point—then would arise the only other question in the case, which would not arise until you had settled in your minds that there was negligence on the part of the defendant. That question would be the question of damages. * * *

Gavin W. Hart, for appellant.

D. Webster Dougherty, for appellee.

PER CURIAM.—We find no error in this record. The stairway leading from the bridge to defendant's station where the accident occurred was at that time, and for some days previously, in the use and control of the defendant company, and

open for all persons going to and from its station. The deceased had used it in order to reach the station to buy his ticket. The defendant may therefore be said to have invited the public to make use of the bridge, and it was its duty to see that it was in a reasonably safe condition. We do not think the doctrine in regard to independent contractors applies to the facts of this case. While there was some conflict of testimony, the facts were for the jury.

Judgment affirmed.

The Doctrine of Independent Contractors.—For a discussion of this subject, see *Bibb's Adm'r v. Norfolk & W. R. Co.* (Va.), 47 Am. & Eng. R. Cas. 651; *Atlanta & F. R. Co. v. Kimberly* (Ga.), 47 *Id.* 307, and authorities cited in note, 815.

OHIO & MISSISSIPPI R. Co.

v.

STANSBERRY.

(132 *Indiana*, 533.)

Defective Platform—Personal Injuries—Special Interrogatories—Statutes.—In an action against a railroad company for injuries received upon alighting from a railroad train upon a defective platform, a request to submit to the jury the following interrogatory: "If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so?" does not comply with the requirement of the statute providing that the jury, in case they render a general verdict, may be required "to find specially upon particular questions of fact," because the determination of what would have been a reason or excuse for not looking necessarily involved a question of law; therefore, such request was properly refused.

Contributory Negligence—Care Required of Passengers in Using Platform.—An instruction that, "if there is an apparent defect in the appliances with which they [the passengers] come in contact, or which are in use, they must look; and unless some reasonable excuse is given, they are guilty of negligence if they do not look," was properly refused as an incorrect statement of the law, placing a passenger in the same relation to the railroad company as its servant occupies.

Same.—It was not error to refuse to instruct the jury that "if there was a hole in the platform at the point where the plaintiff alighted, and if in the exercise of ordinary care in alighting she could and should have seen it, and she could by seeing it have avoided any injury, and she failed to see it, you must find for the defendant," since such instruction would cast upon the passenger the use of a degree of care in looking for defects which she was not required to exercise.

APPEAL from Lawrence circuit court.

Ramsey, Maxwell & Ramsey and Dunn & Dunn (Edward Barton, of counsel), for appellant.

Joseph Giles and R. N. Palmer, for appellee.

MILLER, J.—This action was brought to recover damages for a personal injury. The complaint is in two paragraphs. The first charges that the appellee, who was the plaintiff in the action, was a passenger upon the appellant's road from Huron to Mitchell, and that in alighting at that point from the train she stepped into a hole in defendant's platform, which was out of repair and unsafe, and injured her foot. The second paragraph alleges that in consequence of the negligence and carelessness of the conductor and brakeman in not assisting her off the train she stepped or fell into a hole in the platform and was injured. The answer was a general denial of all the material allegations of the complaint. The questions of law discussed in the briefs of counsel relate to the refusal of the court to submit to the jury two interrogatories propounded by the defendants, to the refusal to give instructions asked by defendants, and to the action of the court in making an oral modification of one of the charges to the jury, after having been requested to put its charges in writing. These questions we will consider in their order.

Interrogatories were submitted to the jury, and answered as follows: "(1) Question. Was it daytime or night-time when plaintiff stepped off defendant's train at Mitchell? Answer. Daytime. (2) Q. Did plaintiff look to see the condition of the platform before she stepped upon it? A. She did not. (3) Q. Was the condition of the platform at Mitchell, upon which the plaintiff stepped, open to view? A. Yes. (4) Q. What was there to have prevented plaintiff from seeing the condition of the platform before she stepped upon it. A. Nothing." The interrogatories asked and refused were as follows: "(11) If plaintiff did not look to see where she was stepping when she alighted, what reason or excuse was there for her not doing so? (12) If you answer question eleven affirmatively, if there was any other reason or excuse, state fully what it was." We are of the opinion that the court did not err in refusing to submit these interrogatories to the jury. The court did submit interrogatories calling for particular questions of fact that seem to have been sufficient to call out generally the facts surrounding the happening of the accident, and we may assume that other interrogatories calling for other particular facts would likewise have been submitted if proposed and tendered in season. The interrogatories refused do not comply with the requirement of the statute providing that the jury, in case they render a

Special Interrogatories.

general verdict, may be required "to find specially upon particular questions of fact to be stated in writing." It has been frequently held that this does not contemplate a finding upon the whole matter in issue (*Uhl v. Harvey*, 78 Ind. 26); nor an issue in the case (*Todd v. Fenton*, 66 Ind. 25); nor one calling for a conclusion of law (*Railroad Co. v. Worley*, 107 Ind. 320; *Railroad Co. v. Ostrander*, 116 Ind. 259, 38 Am. & Eng. R. Cas. 346); nor for mingled question of law and fact (*Town of Albion v. Hetrick*, 90 Ind. 545; *Railroad Co. v. Pedigo*, 108 Ind. 481, 27 Am. & Eng. R. Cas. 310). In order to answer the interrogatories it would have been necessary for the jury to have determined what, under all the circumstances, would have been a reason or excuse for not looking. This determination of what would have been a reason or excuse for not looking necessarily involves a question of law which cannot be submitted to a jury by an interrogatory.

The failure of the court to give the fifth and eleventh instructions asked by the defendant was made grounds on which a new trial was asked. These instructions are as follows: "(5) The rule of law is that any one who seeks or accepts transportation by railway or other means, necessarily more or less accompanied with danger, must exercise ordinary care for their own safety while being so transported, or in taking passage on or leaving trains. They must exercise the faculties which they possess. If there is an apparent defect about the appliances with which they come in contact, or which are in use, they must look; and, unless some reasonable excuse is given, they are guilty of negligence if they do not look." "(11) If there was a hole in the platform at the point where the plaintiff alighted, and if, in the exercise of ordinary care in alighting, she could and should have seen it, and she could, by seeing it, have avoided any injury, and she failed to see it, you must find for the defendant." By the fifth instruction, a traveller who intrusts himself to the care of a carrier for transportation is, as to the duty of inspection and care, placed in substantially the same condition as that occupied by a servant engaged in the master's service. The positions occupied by these two classes are essentially different, and in this difference lies the vice of the instruction. That it is the duty of a railway carrier of passengers to provide for the safe entry and exit of its patrons from its cars, including the proper care of its depots, platforms, and approaches, has been recently held in the well-considered cases of *Railroad Co. v. Lucas*, 119 Ind. 583; *Lucas v. Pennsylvania Co.*, 120 Ind. 205; *Pennsylvania Co. v. Marion*, 123 Ind. 415; *Liscomb v. New Jersey*,

Degree of care
required of
passengers.

etc., Co., 6 Lans. 75; *Railway Co. v. Grush*, 67 Ill. 262; *Hutch. Carr.* (2d ed.) §§ 516, 517.

In order to make a passenger using a platform guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding that it was dangerous, and such as to place one in peril to pass over it to and from a train. In *Brassell v. Railroad Co.*, 84 N. Y. 241, 3 Am. & Eng. R. Cas. 380, it is said: "A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger; and, while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train." In the case from which we have quoted, the plaintiff, who was a passenger, got off a car, and started to leave by passing across another track of defendant, when she was run down and killed by an approaching train. The evidence tended to show that she did not look to the east, from which direction the train was approaching, and that, if she had looked, she could have seen it in time to have avoided injury. The court refused to charge that the failure of the deceased to look to the east before going upon the track was in law negligence upon her part. On appeal this ruling was sustained, the court saying: "The fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence, but her omission to do so was not, in law, decisive against a recovery." To the same effect, see *Terry v. Jewett*, 78 N. Y. 338; *Murphy v. Railroad Co.*, 88 N. Y. 445, 8 Am. & Eng. R. Cas. 490; *Lent v. Railroad Co.*, 120 N. Y. 467, 44 Am. & Eng. R. Cas. 373. We are satisfied that a passenger upon a railway train has a right to confidently rely upon the care and watchfulness of the carrier to make all things safe for his transportation, with its necessary incidents. While passively submitting himself to its care during the journey, or while entering upon or leaving its cars in the usual place and ordinary time and manner, he is not to be deemed guilty of negligence unless knowledge of a defect or peril is thrust upon him, and he then fails to use ordinary care to avoid injury. The eleventh instruction asked by the defendant is less objectionable than the fifth, but casts upon a passenger the use of a degree of care in looking for defects which he, under the circumstances, is not required to exercise. It is also objectionable for failing to limit the duty of avoiding injury to such as would result from the use of ordinary care and skill. The defect in the platform may have

been visible to a passenger alighting from a train, but may not have appeared to be dangerous, or likely to cause injury.

Complaint is made of the refusal of the court to give the following instruction: "(13) You cannot consider the allegations of the complaint as to the duty of defendant's employés to assist plaintiff to alight, for there was in this case no legal duty resting upon them." The latter part of this instruction is quite indefinite, but, assuming that the instruction contained a correct statement of the law under the evidence, it was not in error to refuse it. We find in the record instructions upon the subject that were given to the jury quite as favorable to the appellant as the one refused. The defendant requested the court to reduce its instructions to writing, which was done, but during the reading of the same to the jury, after reading one of its instructions, the court stopped, and said: "That is not correct. I'll read that again," and thereupon re-read said instruction. Every statement or remark made by a court during the time consumed in delivering its charge to the jury is not necessarily a part of its instruction. A statement not bearing upon questions of law or facts involved in the issue is not to be taken as a part of the instructions. *McCallister v. Mount*, 73 Ind. 559; *Lawler v. McPheeters*, *Id.* 577; *Hasbrouck v. City of Milwaukee*, 21 Wis. 219; *Lehman v. Hawks*, 121 Ind. 541. We do not understand the remark made by the court to refer to anything contained in the instruction being read, but to some mistake in reading it. The statement, "I'll read that again," shows that by a second reading the court proposed to correct the mistake referred to. This was consistent with the idea of a mistake in the first reading, but would have been a repetition, not a correction, of an instruction deemed erroneous.

We find no error in the record.

Judgment affirmed.

Defective Platform and Station Appointments—Injuries to Passengers.—

See *Skottowe v. Oregon, St. L. & U. N. R. Co.* (Oreg.), 51 Am. & Eng. R. Cas. 444, and cases cited in note, 458. See also notes, 38 Am. & Eng. R. Cas. 509; 27 *Id.* 130; 30 *Id.* 171; 35 *Id.* 481; 23 *Id.* 517.

Care Required of Company to Make Platform Safe.—*Gulf, C. & S. F. R. Co. v. Butcher* (Tex.), 52 Am. & Eng. R. Cas. 615.

Defective Premises—Ownership of Passageway—Presumption.—In *East Tennessee, V. & G. R. Co. v. Watson* (Ala., Nov. 12, 1891.), 10 So. Rep. 228, it was held that passengers could not be presumed to know in regard to the ownership of a bridge on the railroad company's right of way, connecting its depot platform with a hotel, although the bridge had been constructed by the hotel proprietor and turned over to the company for the use of passengers in passing to and from the hotel; and that the company was liable for any injuries thereon, although it had never repaired the bridge or exercised any control over it, and had not used it for any purpose

during the three years preceding the time of accident. In this case the court said: "We cannot suppose that travellers are informed as to the ownership or control of passways thus circumstanced. They act on the appearance of things, and are authorized to so act. Seeing the two bridges or platforms extending from the railroad's platform proper to the ticket-office and eating-house, they may well suppose they are invited to take either. It is sometimes said a man may do as he will with his own. This is not universally true. *Sic utere tuo, ut alienum non lēdas*. No man is permitted to place traps or pitfalls, or to maintain them, even on his own lands, where others are likely to enter, without proper warning of the danger. Eminently is this true when there is likelihood that he will enter, and a *quasi*-invitation that he shall do so. In *Railway Co. v. Thompson*, 77 Ala. 448, we said: 'There is a common duty resting on all persons, artificial as well as natural, who own real estate on which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls; and, if this duty be neglected and injury results therefrom to any person, the person suffering by such trap or pitfall may recover damages for the injury. This is a general rule of society, crystallized into law. It partakes of the nature of a public nuisance, done or suffered, which inflicts special injury on an individual. To a suit for such injury it is no defence that the injury was not intended. Human conduct must be tested by its known general or ordinary consequences.' " 16 Amer. & Eng. Ency. Law, 957, and note 2.

Contributory Negligence—Pleading.—In *Ohio & M. R. Co. v. Levy* (Ind., Dec. 15, 1892.), it was held, in an action against a railroad company for injuries occasioned by a fall into an unguarded excavation adjoining the defendant's track in a city, that it was not necessary to allege that the plaintiff was ignorant of the existence of the ditch, where the complaint stated that the defendant was negligent, and the plaintiff was not guilty of contributory negligence. The court said: "Knowledge is important as a matter of evidence, but it is not necessary to negative its existence, where negligence is alleged, and the general averment that the plaintiff was without fault is appropriately made. See authorities cited in Elliott, Roads & S., notes 1, 2, p. 470; *Railway Co. v. Walker*, 113 Ind. 196, and cases cited; *City of Anderson v. East*, 117 Ind. 126-130, 25 Am. & Eng. Corp. Cas. 206. The rule that an employé who sues his employer for injuries sustained because of defective machinery or appliances must aver that he did not have knowledge of the defect is well established. *Railway Co. v. Sanford*, 117 Ind. 265, and cases cited; *Railway Co. v. Corps*, 124 Ind. 428, and cases cited; *Matchett v. Railway Co.* (Ind. Sup.), 81 N. E. Rep. 792. But this rule has no application to a case such as this, where a person rightfully crossing a public street falls into a ditch or pit wrongfully left unguarded by a railway company under a duty to construct a safe crossing."

LOUISVILLE, NEW ORLEANS & TEXAS R. CO.

v.

HIRSCH.

(69 *Mississippi*, 126.)

Injury at Station—Necessity of Crossing Track to Reach Station—Duty of Railroad Company.—Where several intervening tracks between a station and the business part of a town have been levelled up with cinders so as to make a smooth crossing, over which the railroad officials and the public continually pass in going to and from the station, there being no other convenient passageway, persons who are injured by a train while crossing such tracks cannot be held to be on the right of way by permission only, but are there at the invitation of the company; and it is the duty of the railroad company to exercise extraordinary diligence in the management of its trains at such a crossing.

Same—Children Injured—Supervision of Older Person—Imputed Negligence.—Where a girl aged fourteen, in attempting to reach the station over the said crossing, being under the charge of an older person, was injured by a train which backed upon her as she was attempting to pass in front of an engine on another track, the negligence of the older person could not properly be imputed to the child, since she had arrived at years of sufficient discretion to exercise care for herself.

APPEAL from Washington circuit court.

This action was brought by Henrietta Hirsch to recover of the Louisville, New Orleans & Texas Railway Company, damages for the death of one daughter aged seven, and injuries to another aged fourteen, who were struck and run over by a backing train of the defendant. She seeks to recover for loss of services of the children, medical bill, and funeral expenses. The defendant pleaded the general issue, and also defended upon the ground that the children, as well as their adult attendants, were guilty of contributory negligence.

The accident occurred in the village of Leland, in Washington county. The depot-building contained in one end a waiting-room for passengers, and ticket-office, while the other end of it was used for a hotel and saloon. Appellant's cars always stopped there to take on and put off passengers. This building is separated from the only business street of the village by four railroad tracks—one main track and three switches running parallel north and south for some distance—the building being west of these tracks and the town of Leland east of them. The street is also parallel to the tracks, separating the town from them, and several plank

walks extend across the street to the eastern edge of the tracks. These walks were constructed by and in the interest of shop-keepers in the village, but have been used by the public in going to and from the depot. All the tracks in the vicinity of the depot and the intervening spaces are filled in with cinders, and are thus made level and smooth. There was no well-defined crossing over the tracks in the vicinity of the depot, but several hundred feet north of the depot-building there was a crossing maintained by the company leading from the east across the tracks to a warehouse or freight-depot situated on the west side of the above mentioned four tracks. It was shown, however, that this crossing was never used by pedestrians approaching the depot from the business portion of the town. The accident occurred about 10 o'clock at night.

A few minutes before the train was expected to leave for Greenville the two children, who intended to go to that place, left the business portion of the village in company with a Mr. Dreyfus and his wife and one Kaufman, a friend, intending to go to the waiting-room. They went to one of the crossings which extended over the street to the tracks and found it blocked by a long freight-train standing on one of the tracks and having two tracks between it and the depot. Finding that the other street-crossings were also blocked by the freight-train,—at least apparently so,—they went south, around the engine of the freight-train, this being the shortest and most convenient way to reach the station. The two children were immediately in front of Kaufman, who was followed closely by Dreyfus and his wife. They hurried around the engine of the freight-train, which was blowing off steam. There is conflict in the evidence as to whether the freight-train was moving or not. If moving at all, it was very slowly. According to the plaintiff's witnesses, it began to move as the children went around the engine. As they rushed upon the next track the two children were struck and run over by a backing passenger-train. Kaufman, discovering the danger the children were in, shouted to them, but too late to avoid the accident. The younger girl died from her injuries, and the older girl was seriously and perhaps permanently injured.

The record contains much conflicting evidence; but this general statement of facts, taken in connection with that contained in the opinion of the court, will be sufficient for an understanding of the questions decided by the court.

Many instructions were asked and obtained on both sides, the fourteenth, of which special mention is made in the opinion, being as follows: "The court instructs the jury that if

Henry Dreyfus had charge of the children for whose injuries this suit is brought, and, in endeavoring to reach the depot of the defendant from the town of Leland, he hurried in front of a freight-engine of defendant's standing upon one of its tracks, and, knowing that there were other tracks between the track upon which said freight-engine was standing and the depot, and that trains of the defendant were liable to be passing backward and forward upon said other tracks, without stopping to look or listen for such trains, he allowed the children to go upon the track of the defendant, where they were struck by a train, they will find for the defendant."

The jury found a verdict for plaintiff, assessing her damages at \$7500; but the court deeming this excessive, a remittitur of \$5700 was entered, and judgment entered for \$1800. Defendant appealed.

J. B. Harris, for appellant.

Campbell & Starling, for appellee.

WOODS, J.—The death of one of appellee's children, and the serious disablement of the other, resulted from their being run over by a backing train of appellant. There is no controversy touching this fact. The negligence of the appellant is thus made out *prima facie*, and it becomes its duty to relieve itself of the burden of liability by showing circumstances of justification or excuse. As matter of fact, the jury which tried the issue below found that appellant's evidence did not absolve the defendant corporation from liability, and a careful and protracted examination of all the testimony in the record leaves us unable to declare that the verdict is unsupported by the evidence. In our opinion the children were not trespassers on appellant's premises at the time of the occurrence of the wretched catastrophe. They were not on appellant's grounds by mere permission only. The location of the depot, with its waiting-room and ticket-office; the place at which the trains uniformly were stopped to receive and disembark all passengers (white persons); the necessity of crossing the grounds and tracks of appellant by passengers taking or leaving its cars at Leland, owing to the location of the station-house, and the laying out of the main line and side-tracks of appellant's railway at that place, at or near the point of its depot; the fact that no crossing, other than the space in front of the station-house, and between it and the contiguous town, had been prepared for, or was used by, either the railroad officials and servants, or the general public, for pedestrians, in passing to and fro between the railway-station house and the town adjacent—in a word, the location, layout, and sur-

Crossing
tracks to reach
station.

roundings of the station-house and tracks must be regarded as an invitation to the public to approach and depart from the depot over and across the short, smooth, and convenient space lying between the railway offices and the business street of the town.

It is true some of the witnesses state that the only public crossings at Leland are two, viz., one beyond Deer creek from the town and the depot (whose mention even, in this case, seems idle), and another about 600 feet northwardly from the station-house and hotel in which the ticket-office and waiting-room were kept, at the point denominated the "Fifth-street Crossing." Whether any crossing for persons on foot was to be found where Fifth-street crossing was intersected by the railway tracks seems doubtful, to say the least. That a foot-walk had been prepared by the defendant corporation on the west of this crossing, designed to be used by persons passing from the crossing, or the company's warehouse near the crossing, to the depot immediately across the tracks from the business part of the town, is shown by the evidence of one witness; but that this was known to the public, or any part of it, desiring to embark upon or disembark from trains of appellant, does not appear, nor is there any evidence showing that any human being, railway servant, or stranger ever used said prepared walk on the west of the tracks in passing from Leland to the station-house of appellant. It is safe to say that no passenger, stranger to Leland and the railway buildings and layout of tracks, on disembarking at the station-house at that point, either by day or by night, and particularly by night, would have walked up northwardly for 600 feet on the west side of the lines to the Fifth-street crossing, and there have walked over the tracks, and then have turned southwardly, and walked back 600 feet to the town, when the absence of all beaten and defined walks leading to the town from the depot invited him to use the smooth, convenient, cindered ground over which the line ran, immediately in front of the depot, and beyond which, in immediate reach and view, lay the town.

So inviting passengers to approach its depot in this town, the appellant was under strong obligation to exercise the utmost care and caution in the movement of its trains and the handling of its cars, so as to prevent injuries to persons going to or from its offices. Did it exercise the utmost care and caution in moving its trains at the time when the injuries complained of were inflicted? The jury has found that it did not, and the facts are not so clearly and strongly in conflict with this finding as to justify a reversal by us. That the injuries were in-

Implied invitation to passengers to cross track.

flicted by the train of appellant is confessedly shown, and *prima facie* its negligence is thereby made out. Is the evidence clear and convincing that the injuries were inflicted under circumstances of excuse or justification, whereby the appellant is absolved of wrong? We are not warranted in so affirming. The harrowing accident occurred in a second, almost in the twinkling of an eye, as appellant's counsel graphically characterize the time, and every incident connected with or accompanying it transpired in a moment or two, at the outside. The night was dark, and the surroundings unfavorable for exact observation or minute examination. As to the occurrence and its attendant circumstances, there is, as was to have been expected, even from persons altogether truthful and trustworthy, much seeming, and some real contradiction. The theory of the appellee was that the children were passing around a motionless train, and when on the track, in front of it, the same was suddenly put in motion, and steam was blown off, and that in escaping this threatened danger, caused by appellant's servants, the children, in their alarm and confusion, blinded by the glare of the headlight of the train thus suddenly put in motion, and their vision and hearing obstructed and impaired by the steam being blown off by this engine, were caused to come into contact with another train, backing down upon another track, which had been hidden from them by a long train of cars, whose engine they had undertaken to pass around. The theory of the appellant was that the children unnecessarily rushed around a motionless engine, and, without using any precaution, recklessly ran upon another train, being cautiously, and in the usual manner, moved upon another track. There is evidence to support each of these theories, and the jury might properly have found the facts as contended for by either party; but, having found as the jury did, the question is not whether we would have so found, but whether such finding can be said to rest on evidence.

It is contended, further, that the trial court erred in its action upon the instructions asked by appellant, and refused. We might content ourselves by saying that the instructions given for appellant fully stated the law for defendant below, and that those refused were properly withheld from the jury. We think it proper to consider the action of the court in refusing appellant's fourteenth instruction, however, and to show the correctness of such action. The instruction wholly excludes from the mind of the jury the element of the responsibility of the two children, and of the reciprocal rights and duties of them and the railroad company. The elder child

Care of children—Imputed negligence.

had presumptively arrived at the age when discretion is usually exercised, though not in perfect degree. She, at any rate, was no longer an infant in leading strings, nor a minor of such tender years as to preclude discretion on her part, and accountability and responsibility proportionate to her discretion. Where the child is not wholly irresponsible, the capacity and experience of such child are to be considered; and, whether, in the particular case, the injured minor exercised the care and caution usually looked for in other children, of like age and capacity with the one complaining, is a question for the jury's determination. The wholly irresponsible infant has imputed to it, without limit or qualification, the conduct of the parent, or other person standing *in loco parentis*, but this is not the rule of reason or law in case of a child who has arrived at an age where capacity and discretion are presumed. The supposed negligence of Henry Dreyfus is imputed bodily to both children, and any consideration of their capacity, experience, and discretion is excluded from the jury. The knowledge of Henry Dreyfus as to the situation of the depot at Leland, the lay out of the tracks, and the movement of trains is imputed, in its entirety, to the children.

The absolute imputation of the negligence of Dreyfus was improper, and the instruction was erroneous, to the extent indicated. Affirmed.

Injuries to Persons Crossing Tracks at Railroad Stations.—See *post*, Richmond & D. R. Co. v. Powers, and cases cited in note.

RICHMOND & DANVILLE R. CO.

v.

POWERS *et al.*

(U. S. Supreme Court, April 17, 1898.)

Injury at Station—Crossing Track—Failure to Ring Bell—Negligence.—In an action against a railroad company for death at a railroad station, it appeared that the deceased alighted from a railroad train in the night-time. After alighting, he helped to assist a family from the train and then attempted to cross an intervening track to the railroad eating-house. The two tracks were eight or ten feet apart, the ties of the intervening one having been covered with dirt and made level for the accommodation of passengers. Neither the deceased nor those with him knew that there was a track in that place. The deceased was struck by a train running at a rapid rate in a direction opposite to that of the one on which he had trav-

elled, without any signal to indicate its approach having been given. It appeared that neither the deceased nor his fellow-passengers had ever been at that station before. *Held*, that, although there was some conflicting testimony as to the facts above stated, the deceased could not, as a matter of law, be held guilty of contributory negligence.

IN error to the U. S. Circuit Court for the northern district of Georgia.

On April 11, 1886, W. D. Powers was run over by a train belonging to the Richmond & Danville Railroad Company, at a station known as "Lula," and so injured that he died in a few hours. This action was brought to recover damages therefor. The plaintiffs are his children, and the proper parties, under the Georgia statutes, to maintain the action. It was commenced in the city court of Atlanta, Ga., and thence removed by the defendant to the Circuit Court of the United States for the northern district of Georgia. A trial was had in November, 1888, which resulted in a verdict and judgment in favor of the plaintiffs for \$9800. On the trial the defendant asked the following instruction:

"The undisputed fact exists in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full possession of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running toward him at the rate of five or six miles an hour, and not more than ten feet off, and was almost instantly run over and killed.

"To say that this was an ordinarily careful act, or that this conduct was not negligence on his part, would do violence to a plain and well-settled principle of law. Admitting that he was a passenger, and therefore not bound, as a traveller on the highway approaching a crossing would be bound, to listen and to look both ways before attempting to cross the track, still the immediate presence, within a few feet, of a moving locomotive, would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him, in more ways than one, that he ought not to put himself on the track, right in front of it.

"It cannot be doubted that this was a careless and dangerous step. If he had been ordinarily careful he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died and had brought suit, he could not have recovered, nor can these plaintiffs recover, under these facts; and it is therefore your duty, under the new law, to find a verdict for the defendant."

This instruction was refused, and exception duly taken.
Henry Jackson and Pope Barrow, for plaintiff in error.
Hoke Smith, for defendants in error.

BREWER, J.—The only error assigned is in the refusal of the court to instruct the jury, as requested, substantially, that the deceased was guilty of such contributory negligence as to prevent a recovery. It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Well. 657; *Railroad Co. v. McDade*, 135 U. S. 554, 44 Am. & Eng. R. Cas. 505; *Railroad Co. v. Converse*, 139 U. S. 469. No objection is made to the instructions which were given, no suggestion that the law as to negligence and contributory negligence was not properly stated to the jury; so we have the question whether the facts, as developed by the testimony, were such as to compel a declaration, as a matter of law, by the court, that there was contributory negligence on the part of the deceased such as to prevent a recovery.

What are the facts, as disclosed by the testimony? Lula is a station in Hall county, Ga., at which, at that time, both the north and south bound trains of the defendant's road stopped for supper. Deceased was a passenger on the north-bound train. There were two tracks in front of the station and eating-house. The south-bound train arrived first, and ran along the inner track—the one nearest to the station. After its passengers had all gone in to supper, it moved back toward the north, and left the space in front of the station and eating-house open. Soon afterward the north-bound train came in, and passed up on the outer track. This was about 8 o'clock in the evening. The deceased did not intend to go any further than Lula, and expected to spend the night there. The two tracks were from eight to ten feet apart. The earth between the rails on the inner track had been levelled up, covering the ties, so as to make a smooth place for walking upon. There was no light, other than the headlights of the locomotives, and from a bonfire of pine knots near the eating-house. After the north-bound train had stopped, and other passengers had left the train for the purpose of going in to supper, deceased started with two satchels, one in each hand, across the track to go to the eating-house, or hotel; and

Contributory
negligence—
When a ques-
tion of fact.

just at that time the south-bound train moved up, and ran upon and injured him. In reference to the foregoing facts there was no dispute.

Further than that, there was testimony tending to show that as deceased was leaving the train a man with his wife and two children, five and seven years of age, started to get off the car; that deceased, putting down his satchels, stopped to help them off; that there was no conductor, brakeman, or other officer of the company present to render any assistance; that, after they were safely off the car, deceased took up his satchels, and they all started, nearly together, in the direction of the eating-house, at an angle across the inner track; that while thus walking the south-bound train came along, without ringing a bell, at a rapid speed; that the engineer, being on the right hand of the engine, could not see any one on the left side of the track for quite a distance in front of the engine, and the fireman was so occupied that he could not see the track at all; that, just as the engine neared the party, somebody called out, and the man who had been helped off the train by the deceased jumped, with his wife, pushing the children over, and barely landing on the platform as the engine passed by, while deceased, who was at his side, but a trifle in the rear of the others, was caught by it, and run over. It did not appear that any of the party had ever been at Lula before, or knew of the existence of an inner track, or the situation or surroundings, although it did appear that the deceased had been travelling on the railroad. The man and his wife who thus narrowly escaped testified that they did not know there was a track upon which they were walking; that no bell was rung, and that they had no thought of an approaching train until the outcry, upon which they jumped, and barely saved themselves. What the deceased heard and saw and knew is not affirmatively shown, but the entire circumstances of the injury tend to show that he was as ignorant as they in respect to these matters. They had moved but a few steps from the car toward the eating-house before the deceased was struck. Upon such facts as these, is it not a question upon which minds might differ as to whether the deceased was guilty of contributory negligence? Do not these facts tend, at least, to show that he was exercising due care? His tarrying behind the other passengers was owing simply to his effort to help those who needed help, and in discharging a duty resting upon the officers of the company, and neglected by them. After they had all alighted from the car, they started together in the direction of the eating-house, as disclosed by the bonfire, without knowledge of an inter-

vening track, or without thought of an approaching train. No bell was rung, no warning given, until the moment of the accident, and then too late for all of the party to save themselves.

It seems as though there could be but one answer to these questions. If these facts do not establish due care on his part, they at least tend very strongly to prove it. **Conflicting testimony.** It is true that there was testimony tending to show a different state of facts; that the bell of the engine was rung as it moved down the track in front of the station-house; that it was moving at a very slow rate of speed—not faster than a man would walk; that the deceased, on alighting, put down his satchels, waiting for some one from the hotel to come and help him carry them; and that he was there some minutes before he started for the hotel. And, indeed, there was some testimony tending to show that there were no such persons present as the family who claimed that they were helped off the train by deceased. But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court; and unless it were affirmatively shown that the deceased, when he left the car and started toward the eating-house, knew that he was walking along a track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself whether there was present danger therefrom, it surely cannot be held that there was, as a matter of law, contributory negligence on his part.

There was no error in refusing the instruction, and the judgment is affirmed.

Injuries to Passengers Crossing Tracks at Stations and Run Over by Incoming Trains.—See *Chaffee v. Old Colony R. Co.* (R. I.), 52 Am. & Eng. R. Cas. 366, note, 371; *Lake Shore & M. S. R. Co. v. Herrick*, (Ohio), 50 Am. & Eng. R. Cas. 25; *McGeehan v. Lehigh Valley R. Co.* (Pa.), 50 *Id.* 32; *Ensley R. Co. v. Chewning*, 50 *Id.* 46; *Debbins v. Old Colony R. Co.* (Mass.), 47 *Id.* 531, note, 533.

CUNNINGHAM *et al.*

v.

BOARD OF RAILROAD COMMISSIONERS.

(158 *Massachusetts*, 104.)

Location and Relocation of Railroad Stations—Statutes Construed.—Section 156 of the Public Statutes of Massachusetts, which provides that no passenger-station established for five years shall be abandoned without the consent of the legislature, and a later act which provides that, with certain exceptions, stations may be relocated with the written consent of the railroad commissioners and of the local authorities, are not in conflict, in view of the general tendency of the legislature to place the regulation of the relocation of stations within the operation of general laws; and the statutes as they stand authorize the consolidation of two such stopping places into one by relocation at one point in one proceeding, with special regard to the accommodation of the public convenience.

Same—Petition for Certiorari—Parties.—Where none of the petitioners for the *certiorari* to review the action of the commissioners in authorizing such relocation were parties to the proceedings before the board, and none of them would have been entitled to a private remedy if the action of the board was unauthorized, they could not maintain the *certiorari*, however much their estates might be affected by the proposed changes.

CASE reserved from Suffolk supreme judicial court.

Petition of Frederic Cunningham and others for *certiorari* to quash the action of the board of railroad commissioners on a petition to relocate the railroad stations in the town of Brookline, in Norfolk county.

Charles P. Greenough for petitioners.

Samuel Hoar for respondent.

BARKER, J.—The contention that two railroad stations cannot be relocated at the same point in one proceeding under the provisions of Pub. St. c. 112, § 157, because such a change, necessarily lessening the number of stopping-places, is an abandonment forbidden by the provisions of Pub.

St. c. 112, § 156, is unsound. The sections referred to are practically identical with sections 116, 117, St. 1874, c. 372, which was a codification, and contained the direction that its provisions, so far as they were the same as those of existing laws, should be construed as a continuation of them, and not as new enactments. St. 1874, c. 372, § 183. The laws regulating the subjects dealt with by the sections mentioned were St. 1865, c. 175, and St. 1872, c. 162—the first of which provided that no

Relocation and
consolidation
of stations.

station established for five years should be abandoned without the consent of the legislature; and the second that, with certain exceptions, stations might be relocated with the written consent of the board of railroad commissioners and of the local authorities.

Although it was apparent that not only was the public convenience involved in the abandonment of a station, but that the value of neighboring lands might be seriously affected thereby, the subject was first regulated by St. 1865, c. 175. Thereafter the board of railroad commissioners was established, and required, whenever in its judgment a change of stations should be reasonable, to so inform the corporation, and to report the matter to the legislature. St. 1869, c. 408, § 3. See, also, St. 1874, c. 372, § 9; Pub. St. c. 112, § 16. In the year 1871 a petition to compel the erection of a union station was referred to the railroad commissioners, whose report called the attention of the legislature of 1872 to the fact that the petition was one of a numerous class, which should be regulated by a general law authorizing the relocation and discontinuance of railroad stations whenever demanded by a decided preponderance of public convenience and popular desire. Pub. Doc. 1872, No. 29, p. cci. This recommendation seems to have resulted in the passage of St. 1872, c. 162, which contained a section, omitted from the codification of 1874, to the effect that it should be construed not to affect any legislative act specifically directing the construction or maintenance of any station, and not to apply to any station in regard to the location of which legal proceedings were then pending. St. 1872, c. 162, § 2. Instances of such legislative acts were St. 1866, c. 126; St. 1867, c. 112; St. 1868, cc. 89, 384,—considered by this court in *Com. v. Eastern R. Co.*, and *Keene v. Same*, 103 Mass. 254; and St. 1871, c. 343, requiring the erection of the union station in Worcester. Litigation was then pending in the Supreme Court of the United States with reference to St. 1868, c. 348, requiring the erection of a station at a particular point in Lynn. Since the passage of St. 1872, c. 162, numerous stations have been relocated; but in no instance, save the present, has consent been sought to a relocation by which two stations would be consolidated at the same point, except under the provisions of special statutes. Such special acts are found in St. 1878, c. 118; St. 1884, c. 47; and St. 1891, c. 211. A special act authorizing the discontinuance of a station is found in St. 1878, c. 117, and one authorizing an abandonment and relocation at a point so remote that the change could not be made under the provisions of the general law is to be found in St. 1871, c. 183. The provisions of Pub. St. c. 112, §§ 156,

157, were considered by this court in 1884 in *Attorney-General v. Eastern R. Co.*, 137 Mass. 48, 21 Am. & Eng. R. Cas. 237.

Recurring to the state of the legislation upon the passage of St. 1872, c. 162, it is clear that the operation of St. 1865, c. 175, was so far affected by the later statute that an abandonment resulting from a relocation properly made under its provisions is not within the prohibition of the former statute. This conclusion follows from a consideration of the scope of each statute, the history of St. 1872, c. 162, and the fact that every relocation must involve an abandonment of the old stopping-place. It is supported by the peculiar wording of the second section, which declares that the statute shall be construed not to affect certain legislative acts, of which St. 1865, c. 175, was not one. That such was its contemporary construction is shown by the fact that in the ensuing year several stations were relocated (Pub. Doc. 1874, No. 29, p. 36), and no litigation ensued. There is no reason why, in this particular, a different construction should be given to the sections of the codification of 1874, or of the Public Statutes, regulating this subject. These re-enactments show that, when properly construed, the provisions relating to abandonment and to relocation are not in conflict. The omission from the codification of 1874 of the second section of St. 1872, c. 162, thus placing all stations within the operation of the section authorizing relocation, is significant of the intention of the legislature to place the regulation of the location of all stations within the operation of general laws. The instances of special acts dealing with particular stations are but of slight significance. The expenditure of money involved in any change is so great that in any instance the special act may have been sought to compel the corporation to make the change, and special acts are too often granted for purposes which might be accomplished under general laws, to justify an inference that they are passed because, in the opinion of the legislature, a general law does not apply.

Assuming that the statutes as they now stand do not forbid any abandonment which results from a relocation properly made, we reach the question whether section 157 authorizes the consolidation of two stopping-places into one by their relocation at one point in one proceeding. The words of the statute, "may relocate passenger-stations," favor such a view, although, had the singular number been used, that would not have been decisive against it. See Gen. St. c. 3, § 7, cl. 2; Pub. St. c. 3, § 3, cl. 4. But the controlling consideration is to be found in the purpose of the statute. In *Attorney-General v. Eastern R. Co.*, *ubi supra*, the test of the power to make

a relocation under the circumstances there disclosed was not held to be whether the old stopping-place was abandoned; the act that the community served by the old station would be better accommodated by the new one in the same neighborhood was held sufficient to justify a relocation. Where two existing stations are in the same neighborhood, the test is to be found in the convenience of those served by the old stations, unless, as it is not necessary now to decide, if the general public convenience would be increased by a relocation which would not unreasonably incommode those specially accommodated by the old stations, such a state of facts would likewise justify a relocation. In the case cited the change held to be authorized by the statute involved the removal of the stopping-place a distance of 1500 feet. Suburban stations are usually half a mile or more apart, while in the present case both stations are not only in the same town and neighborhood, but are less than 1500 feet apart, and the proposed stopping-place is nearly central between them. It is plain that either station might be properly relocated at the proposed site, and that the ultimate consolidation of both at that point could be accomplished by consecutive proceedings, unless the consolidation of two stations is wholly forbidden. In our opinion it is not. The intention of the present statutes is to allow such changes of stopping-places in any neighborhood, as, having special regard to the accommodation of that neighborhood, shall best serve the public convenience; and since the adoption of this policy by the legislature, as shown by its imposing upon the board of railroad commissioners the duty of recommending all such changes of station as it may deem expedient to secure the safety, convenience, and accommodation of the public, and the passage of St. 1872, c. 162, the hard and fast rule prescribed by St. 1865, c. 175, that the number of stopping-places cannot be lessened, no longer obtains.

This being so, there is no reason why two stations which are so situated that each can be properly relocated at the same point may not be so relocated at the same time and in one proceeding. In such a case, the considerations which must govern the action of the public boards whose consent is necessary are the same, whether their consent is asked to the relocations separately or to both at once. In either course, the same principles are to be applied, and the discretion to be exercised by them is the same. Dealing with both stations at the same time works no additional hardship to any person whose interests are prejudiced by the disuse of either stopping-place, while it allows improvements which benefit the neighborhood to be more speedily and economically accom-

plished. If incidental advantages result to the travelling public, or to the railroad corporation, that is no reason against permitting the course. We regard the decision of this court in *Attorney-General v. Eastern R. Co.*, *ubi supra*, as leaving open the question now decided, as well as that whether the relocation of a single station might be so made as not to be justified by the provisions of Pub. St. c. 112, § 157. In that case there remained as many stopping-places in the town as before; but the old stopping-place was discontinued, and the change was held to be not an abandonment prohibited by the statute, because the community accommodated by the old station were properly found by the commissioners to be better accommodated in the same neighborhood by the new. The decision notes the fact that the number of stations was not diminished, but does not state that such a result could not in any case be properly reached, and no such point was involved in the determination of that case.

It is also clear that the petition for *certiorari* must be dismissed for another reason. None of the petitioners are parties to the proceedings before the respondent, and none of them show such a state of facts as would entitle them to a private remedy if the action of the board was unauthorized or illegal. While, therefore, the law remains as at present, as pointed out by the decision of this court in *Davis v. County Com'rs*, 153 Mass. 218, the petitioners, however much their estates may be affected by the proposed changes, have no standing in court. We have stated our views upon the principal question raised by them, because we were informed at the hearing that the petitioners were in fact the persons who would be most affected by the abandonment of the old stations, and that they, as well as the railroad corporation and the respondent, thought an early indication of the opinion of the court upon the principal question involved of importance, not only in this case, but as affecting the community. Petition dismissed.

Petition for
certiorari—
Proper parties.

Abandonment of Stations—Relocation.—In *State v. Des Moines & K. R. Co.* (Iowa, Feb. 3, 1893.), 54 N. W. Rep. 461, it was held that a railroad company might abandon a station which it had maintained for several years at a point intermediate between two points where its lines crossed other roads, and establish two other stations at equal distances from the two junctions, where it appeared that the inhabitants accommodated by the old station were not deprived of reasonable facilities to transact business with the company; and in such a case the railroad commissioners had no authority to interfere with the defendant in the management of its property and the location of its stations.

See, as to removal and abandonment of stations, *State v. Alabama & V. R. Co.* (Miss.), 50 Am. & Eng. R. Cas. 14.

FLORIDA CENTRAL & PENINSULAR R. CO.

v.

STATE *ex rel.* MAYOR, ETC., OF TOWN OF TAVARES.

(81 *Florida*, 482.)

Mandamus—Enforcement of Public Right—Interest of Relator.—When *mandamus* is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. In such case the relator is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced.

Same—Purpose of the Writ.—*Mandamus* never lies to enforce the performance of private contracts.

Contract Obliging Railroad Company to Locate Depot at Particular Point—Discretion of Railroad Company.—Contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever the public welfare or wants of the public may require.

Same—Authority of Courts to Control Company's Discretion.—The courts are not authorized by *mandamus* to so far control a railroad company's discretion in the matter of the location of its depot buildings as to indicate in any case the exact spot of such location.

Alternative Writ—Recitals.—The mandatory part of an alternative writ of *mandamus* must conform to the case made by the recitals in such writ, and must not require more to be done than is justified by such recitals.

Same—Mandatory Part of Such Writ—Requirements.—The range of action required of the respondent by an alternative writ of *mandamus* should be clearly, particularly, and explicitly set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate outside ascertainment *dehors* the writ.

ERROR to Lake circuit court.

Wall & Knight and *John A. Henderson*, for plaintiff in error.
Alex. St. Clair-Abrams, for defendants in error.

TAYLOR, J.—On the 11th of March, 1891, an alternative writ of *mandamus* was granted and issued by the judge of the circuit court in and for Lake county, in the seventh judicial circuit, upon the petition of the state on the relation of the mayor, inhabitants, and town of Tavares, against the corporate plaintiff in error, the Florida Central & Peninsular Railroad Company. Upon the denial of a motion to quash the alternative writ, and the sustaining of a demurrer to the

respondent's answer, a peremptory writ was awarded, and from this judgment the respondent takes error.

The alternative writ, which contains all the recitals in the petition making application therefor, is as follows: "Whereas, the state of Florida, on the relation of the mayor, inhabitants, and town of Tavares, has filled its petition for *mandamus*, and it appearing from the allegations of the petition that the Florida Central and Peninsular Railway Company, successors to the Florida Railway and Navigation Company, is a corporation duly chartered under the laws of the state of Florida, and doing business in said state, and within the limits of the town of Tavares, and that said town of Tavares has been a regularly established station of and for said railway for more than six years past, and that, when the said railroad was first constructed, Alex. St. Clair-Abrams, in his own person, gave the said railway the right of way in the said town, and also a block of land known as 'Shore Park,' the consideration for which was that said railway company should cause to be constructed on said block of land a passenger depot, and that all passenger-trains of said railway company should stop at such passenger depot; and that the inhabitants and town of Tavares assented to the use and occupancy of the streets and avenues of said town by said railroad upon the understanding and condition that the passenger depot would be constructed on the block known as 'Shore Park,' said block being the best situated and most convenient to the people of Tavares, and that by reason of establishing a station in said town of Tavares, and by reason of its receipt of the land herein described, it became, and was, and still is, the duty of said railway company to construct a passenger depot on said block in said town of Tavares for the proper use and accommodation of the public; that the said Florida Central and Peninsular Railway Company has failed to construct any passenger depot whatever in said town, but stops its trains in the public streets in said town, exposing its passengers and the public to great inconvenience and hardship; that in winter, while the public await the trains of said company, the only accommodation they have are bonfires lit in the public streets, around which the public have to cluster to obtain warmth; that, no provision whatever being made for the public, passengers in said town are compelled to go to the water-closets on the cars while they are standing in said streets, to answer the calls of nature, and human feces and urine are deposited on the public streets or public highway in said town to the great scandal and injury of said town and the inhabitants thereof; that in rainy weather the public are compelled to remain uncovered in the rain or to

seek shelter in adjacent stores and buildings, because of the failure of the said railway company to perform its duty of constructing suitable railroad accommodations; that the Florida Central & Peninsular Railway Company, the successor of the Florida Railway & Navigation Company, in the ownership, control, and operation of said railroad, still permits the scandalous and outrageous condition of affairs to exist in said town; that, although repeatedly requested to construct suitable depot accommodations in said town, it has failed and refused to construct any whatever, and, by reason of its failure so to do, great injury, damage, and inconvenience has resulted, to the injury of the inhabitants of said town, and to the town itself; that the Florida Central and Peninsular Railway Company has taken possession of, and uses, controls, and claims the ownership of, the lands deeded to the Florida Railway and Navigation Company, including the block of land known as 'Shore Park,' deeded for a passenger depot, said block being bounded on the east by St. Clair-Abrams avenue, and on the north by Tavares boulevard, but that the said railroad company utterly refuses to construct any depot on said block, or to construct any depot whatsoever in said town; that heretofore the said railroad company has stopped its passenger trains at the foot of Joanna avenue, in said town, where no depot accommodations whatsoever exist, and that the trains will stop at the foot of said avenue, but that on the 3d of January, 1891, the agents and employes of said railroad company were engaged in measuring the distance from defendant's railroad track near a large marsh to the post-office, and that the petitioner is informed and believes that it is the purpose and intention of said railroad company to hereafter stop its trains near the edge of said marsh; that nearly the entire built-up portion of said town is east and north of said marsh; that the purpose of the defendant is to further annoy and injure the inhabitants of the town of Tavares; that, if the passenger trains of defendant are stopped there, it will not only inconvenience, but will inflict great injury upon, said inhabitants and upon said town; that said marsh is unhealthy, and abounding in malaria; that it presents an unsightly appearance, is forbidding in aspect, and is calculated to impress a stranger most unfavorably of said town and said inhabitants; that it will force said inhabitants and the public to additional inconvenience and expense in going to and from the cars of defendant; that the locality is utterly unfitted for a passenger depot, of which fact the defendant is aware; that the block of land known as 'Shore Park' is the best situated and most convenient for a passenger depot in said town, being only about two hundred

and fifty feet from the post-office, and less than three hundred feet from the principal hotel, and from ten of the fourteen stores in said town, and the most accessible to nearly all of the residences in said town; that it is the duty of the defendant as a public carrier to construct all needed depot accommodations at every one of its stations; that the town of Tavares is an important station on defendant's road; that said town is the county-seat of said Lake county; that it is the junction of five railroads; that the defendant has a large business in said town, both of freight and passengers, and that great wrong and injury has been done to the said town and inhabitants thereof by the failure and refusal of the defendant to construct necessary depots; that by reason thereof the inhabitants of said town and the travelling public have been exposed to sickness and to suffering, and the public health has been endangered: It is therefore ordered that the respondents, the Florida Central and Peninsular Railway Company, proceed immediately to construct, or to have constructed, in the town of Tavares, on the block of land therein formerly known as 'Shore Park,' and bounded on the east by St. Clair-Abrams avenue and on the north by Tavares boulevard, a suitable depot for the accommodation of passengers, said depot to be constructed in conformity with the ordinances of said town, and to be completed by the first Monday in June, 1891, and to stop all their passenger-trains at said passenger depot for the reception and delivery of passengers; or to show cause, if any they have, by the said first Monday in June, A.D. 1891, why they have not obeyed this writ. Done at Chambers, at De Land, Volusia county, Florida, this 11th day of March, A.D. 1891. John D. Brome, Judge."

The respondent's motion to quash this writ was upon the following grounds: "(1) There are no sufficient parties to said relation. (2) There is a misjoinder of parties to the relation. (3) The inhabitants of the town of Tavares have each their individual, full, and complete legal remedy for any and every grievance against the respondents. (4) No obligation of contract between Alex. St. Clair-Abrams and the Florida Railway & Navigation Company, as charged, furnished a legal basis for redress for any breach thereof to the relators, or either of them, by *mandamus*. (5) There is no allegation in the relation of the existence of any ordinance of the town of Tavares in reference to the mode and manner of constructing a depot to support the requirement in the alternative writ that said depot be constructed in conformity with the ordinances of the said town. (6) There is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for

designating a place at said station where the same should be placed."

The refusal of the court to grant this motion is assigned as error. We shall confine our remarks to the points raised by this motion to quash, as a discussion of them will completely dispose of all questions involved in the case.

In support of the first ground of the motion to quash it is urged for the plaintiff in error that, the proceeding having been instituted for the enforcement of a public right, no citizen or number of citizens, in their individual or collective capacity as such, would be entitled to the writ, but that the application for it should have been made by the attorney-general. While there are many cases in several of the states that sustain this contention, yet the decided weight and preponderance of the authorities establish the following to be the correct rule as to who are proper relators in *mandamus* proceedings: "When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator (in such case) is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced." 14 Amer. & Eng. Ency. Law, 218, and authorities there cited. The above has been adopted by this court as being the correct rule in *McConihe v. State*, 17 Fla. 238, and in *State v. Crawford*, 28 Fla. 441.

The second ground on the motion to quash is that there is a misjoinder of parties as relators. The writ was issued in the name of the state of Florida *ex relatione* "The Mayor, Inhabitants, and Town of Tavares." The contention of the respondent is that the mayor in his official character and the inhabitants in their individual capacity have no such similitude of duty or interests as makes it proper to have them joined as relators. Under our laws for the incorporation of cities and towns such towns are required, as part of the process of incorporation, to adopt a corporate name, and by such corporate name they can sue and be sued. Sections 4, 8, pp. 246, 247, McClell. Dig.; sections 661, 665, Rev. St. There was no necessity to have used the words "mayor and inhabitants" in this proceeding. The accurate practice would have been simply to use the corporate name of the town as being the relator (1 Dill. Mun. Corp. [3d ed.] section 237, note 1), as it was evidently the

**Mandamus—
Interest of
relator.**

**Relators—
Union of parties.**

intention of the pleader to make the municipal corporation, "Town of Tavares," the relator in the case. But, the object of the proceeding being to enforce the performance of a public duty, under the rule as above announced the state is to be considered here as the real party; and as the town of Tavares by its corporate name is included as a relator, we can see no harm that could result from treating the words "mayor and inhabitants" as immaterial surplusage, particularly as the mayor is not individually named, and no individual inhabitant is named. The suit, according to the rule, could have been instituted on the relation of any citizen of the town of Tavares, or several of its citizens could have united as relators. The town of Tavares, being a corporation of the state, having the general power as such to sue and be sued, could also, in such a case, be the relator in its corporate capacity. The object of the proceeding being to enforce a public duty, so long as it is instituted and conducted in the name of the state, who, in such cases, is the real party, it is not a matter of so much moment as to who is the relator as that the proceedings will be quashed because of any mere technical misjoinder of parties as relators.

The third ground of the motion to quash contends that there is ample remedy at law for the relief sought here by *mandamus*. The sixth ground of the motion to quash is that there is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating the place at such station where the same shall be located. These two grounds of the motion present the question as to whether the power exists in the courts, in the absence of legislation expressly and specifically prescribing it as a legal duty to be performed by such companies, to compel railroad companies by *mandamus* to establish stations along their lines, and to erect and maintain thereat depot-buildings for freight and passengers. From the specific relief sought by the writ in this case it becomes unnecessary for us to pass upon this question, since to pass upon it with the pleadings herein constructed as they are would be adjudicating an abstract proposition not properly presented. Without, therefore, even intimating any conclusion of our own upon the question, we deem it proper to say that there is weighty and serious conflict in the authorities as to whether the courts can in any case compel a railroad company to establish a station, or to erect and maintain thereat depot-buildings, unless there is legislation in express terms making it a legal duty that they must perform, in contradistinction to a discretionary power that they are authorized to carry out or not,

Power of court
to compel
establishment
of station.

as they see fit. Some of the authorities hold that, independently of any legislation, it is a common-law duty that such companies owe to the public, and that it will be enforced by *mandamus*. Northern Pac. R. Co. v. Territory, 3 Wash. T. 303; State v. Republican Val. R. Co., 17 Neb. 647, 22 Am. & Eng. R. Cas. 506; McDonald v. Railroad Co., 26 Iowa, 124; People v. Chicago & A. R. Co., 130 Ill. 175.

Other authorities, upon the ground that the broad discretion vested in these companies in such matters by their charters is beyond the reach of judicial interference or control, hold that the courts cannot interfere unless the duty is made a clear one by express legislative enactment. People v. New York, L. E. & W. R. Co., 104 N. Y. 58; Northern Pac. R. Co. v. Territory, 142 U. S. 492, 48 Am. & Eng. R. Cas. 475,—overruling 3 Wash. T. 303, *supra*. The case made, however, by the alternative writ before us does not seek merely to compel the erection of a depot-building on the line of the respondent's road at some point at or near the town of Tavares that will be reasonably subservient to the wants and convenience of the inhabitants and business of that community, leaving the exact spot of its location there to the discretion necessarily vested in the company in such matters, but the sole demand of the writ is that the respondent company shall be compelled to erect a depot-building on the particular lot in said town known as "Shore Park."

There is no better settled elementary principle in the law of *mandamus* than that the writ will never lie to enforce the performance of private contracts. Merrill, Mand. § 16, and numerous authorities there cited; High, Extr. Rem. § 25, and authorities cited; State v. Patterson, N. & N. Y. R. Co., 43 N. J. Law, 505; Parrott v. City of Bridgeport, 44 Conn. 180. Besides this principle, in so far as the alternative writ would seem to predicate its contention for the location of the depot upon the exact spot known as "Shore Park" upon the private contract between Alex. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, it seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. In Marsh v. Railway Co., 64 Ill. 414, where the effort was made by bill in equity to enforce the specific performance of such a contract, the court says: "The location of railroad depots has much to do with the accommodation of the wants of the public; and, when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot admit that an individual is entitled to call

Discretion of
railroad com-
pany regard-
ing stations.

for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantages of such individual. Railroad companies, in order to fulfil one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy.”

In *People v. Chicago & A. R. Co.*, 130 Ill. 175, the court says: “It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void.” The same doctrine was announced by Chief Justice SHAW in *Fuller v. Dame*, 18 Pick. 472; and also in *Railroad Co. v. Ryan*, 11 Kan. 602; *Railroad Co. v. Seeley*, 45 Mo. 212; *Currie v. Natchez, J. & C. R. Co.*, 61 Miss. 725. In *Mobile & O. R. Co. v. People*, 132 Ill. 559, 42 Am. & Eng. R. Cas. 671, the court says: “The location of stations for the receipt and discharge of passengers and freight at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, the railway company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point, when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself, by contract with individuals, to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require.” The same doctrine is held in *Holladay v. Patterson*, 5 Oreg. 177, in which case the court says: “A railroad company is a *quasi*-public corporation, and the public have an interest in the location of their lines of road and depots. An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate

or betray them will not be enforced." *Railway Co. v. Marshall*, 136 U. S. 393, 42 Am. & Eng. R. Cas. 637.

Counsel for the relator contends, however, in his briefs filed here, that the right to compel the location of the depot on Shore Park is not predicated upon the contract between Mr. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, but that the allegations as to this contract contained in the writ are merely by way of recital to show that the company owned sufficient and suitable land for depot purposes, donated for such purpose, and that such land is most convenient for public use, and to forestall any claim by the company that they were without land in a convenient part of the town for depot purposes. Conceding, for the purposes of this case, that the alternative writ as framed will permit this contention, still the law will not, in our judgment, authorize the court to dictate the exact spot of the location of the depot building or to confine its location to any particular lot or block of ground. All of the authorities *supra* bearing upon this question agree that a very broad discretion is vested in these companies by their charters in the matter of the location of their roads, stations, depots, etc.

We have been unable, after the most laborious search, to find a single case where any court has ever undertaken to so far encroach upon this discretion as to dictate the exact spot of the location of one of its depot-buildings; and, though the power may lie in the courts, upon a proper case made, and without legislation expressly enjoining it as a specific legal duty, to compel railroad companies to erect depot-buildings at their stations, so that the convenience of the public there will be reasonably and measurably subserved, still we are perfectly satisfied from the authorities cited that the courts are not authorized to so far control the company's discretion in the matter as to dictate in any case the exact spot of the location of one of its depot-buildings; but such exact location must, of necessity, in every case, be left to the company's discretion to determine, limited only by the condition that it must be so located as to be reasonably subservient to the convenience of the community to be accommodated thereby. In reaching this conclusion we have not failed to consider that the language of our statute empowering railroads to build and maintain depots is permissive only, and not mandatory; but, even if it were mandatory as to the duty to erect depots, our conclusion would remain the same, that the effort of this writ to dictate its exact location could not be sustained.

In the mandatory part of the alternative writ, to which the

peremptory writ also conforms, the respondent is required, not only to construct a depot upon the particular lot known as "Shore Park," but to construct it "in conformity with the ordinances of said town." Neither in the relator's petition for the writ nor in the recitals of the alternative writ is there any mention whatever of the existence of any ordinance of said town prescribing any regulations as to buildings of any kind in said town. This defect in the alternative writ constituted the fifth ground of the respondent's motion to quash. It is well settled that great care, particularity, and certainty is required in the preparation of the mandatory part of the alternative writ, and that it must conform to the case made by the recitals in the writ, and must not require more to be done than is justified by the recitals. *Merrill*, Mand. § 260; *Hartshorn v. Assessors*, 60 Me. 276; *King v. Church Trustees of St. Pancras*, 1 Nev. & P. 507; *Fisher v. Mayor, etc.*, 17 W. Va. 628; *State v. State Board of Health*, 103 Mo. 22; *People v. Brooks*, 57 Ill. 142; *Tapp. Mand.* 371. Another rule applicable to *mandamus* that seems to be equally well settled is "that the range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look *dehors* the writ to ascertain his duty." *Merrill*, Mand. § 260; *Cross v. Railway Co.*, 34 W. Va. 742, 47 Am. & Eng. R. Cas. 381; *Hartshorn v. Assessors*, *supra*; *State v. Mobile & M. Ry. Co.*, 59 Ala. 321. The requirement of the respondent to construct its depots in conformity with the ordinances of the town of Tavares not only overstepped the case as made by the recitals in the petition and writ, but left the respondent's duty thereunder in a state of uncertainty, to be ascertained from the town ordinance, if there was any, entirely *dehors* the writ.

The motion of the respondent to quash the alternative writ should have been granted.

The judgment of the court below is reversed, and the cause remanded for such further proceedings as shall not be inconsistent herewith.

Removal and Abandonment of Railroad Stations.—*State v. Alabama & Vicksburg R. Co.* (Miss.), 50 Am. & Eng. R. Cas. 10, and note, p. 14; *Cunningham v. Board of Railroad Com'rs*, *ante*, p. 801.

Mandamus to Compel Location of Station.—See *Northern Pac. R. Co. v. Territory* (U. S.), 48 Am. & Eng. R. Cas. 475, and cases referred to in note, 490.

Validity of Contracts for Location of Stations—Public Policy.—The validity of contracts designed to influence the site or location of stations has been frequently questioned and denied. 21 Amer. & Eng. Ency. Law, 120, tit. "Stations." Sometimes such contracts have been held objectionable in providing that no other station should be located near by. A contract of this nature is void, as having a tendency to prevent the corporation from

discharging properly its duties to the public at large. This rule applies whether the contract exists specially, or as a condition in a deed of conveyance. *Marsh v. Fairbury, etc.*, R. Co., 64 Ill. 414, 16 Am. Rep. 564; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257, 9 Am. & Eng. R. Cas. 600; *Mobile, etc., R. Co. v. People*, 132 Ill. 559, 42 Am. & Eng. R. Cas. 671; *Williamson v. Chicago, etc., R. Co.*, 53 Iowa, 126, 26 Am. Rep. 206; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357. See also *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369. In *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 24 Am. & Eng. R. Cas. 644, the court, by MITCHELL, J., said: "Railroad corporations are regarded as public agencies, owing duties to the public generally. They are therefore not authorized to make any contract which may prevent them from discharging their duties efficiently to the public, and for that reason they cannot contract that the company will not locate a station or erect a depot at a place where the demands of business or concentration of population may at some time in the future require it. Such a contract is void as against public policy."

In *Tucker v. Allen*, 16 Kan. 312, one of the conditions of the deed was that no railroad depot should be built at a certain place within one year. No depot was built at such place within that time, and all the other conditions were strictly fulfilled; nor was there anything to show that injury or inconvenience ever resulted to any person or to the public generally because no depot had been built at the place designated. It was held that neither the grantor in the said deed, nor any person claiming under him, could avoid the deed merely because of the supposed illegality in inserting the condition as to not building a depot. See, however, *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437, in which a stipulation that "but one other depot" should be allowed between certain points was not objected to by court or counsel.

Sometimes contracts have been made with an officer of the railway, or some person supposed to be influential with the corporation, and he has agreed, for a consideration, to secure the location of a desired station. Such a contract is void, as against public policy. *Fuller v. Dame*, 18 Pick. (Mass.) 472 (leading case); *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 60, 24 Am. & Eng. R. Cas. 644, 55 Am. Rep. 719; *Holladay v. Patterson*, 5 Oreg. 177. See also in this connection *Houston, etc., R. Co. v. McKinney*, 55 Tex. 176, 8 Am. & Eng. R. Cas. 723, holding that an agent of a railroad company, acting under a general power to procure a right of way for the road, has no authority to contract that the company will locate its stations at particular places. *Bestor v. Wathen*, 60 Ill. 188; *Linder v. Carpenter*, 62 Ill. 309; *Workman v. Campbell*, 46 Mo. 305.

But where the contract is with the railroad company that it shall furnish a station at the place desired, in consideration of a donation of money or grant of land, and there is no restriction or prohibition against the location of other stations, there is no rule of law or policy violated, and such contracts are usually upheld. *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 24 Am. & Eng. R. Cas. 644; *Atchison, etc., R. Co. v. Jefferson Co.*, 21 Kan. 309; *McClure v. Missouri River, etc., R. Co.*, 9 Kan. 373; *Vicksburg, etc., R. Co. v. Ragsdale*, 54 Miss. 200; *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 22 Am. & Eng. R. Cas. 54; *Texas, etc., R. Co. v. Robards*, 60 Tex. 549, 48 Am. Rep. 268; *Nottawasaga Tp. v. Hamilton, etc., R. Co.*, 16 Ont. App. Rep. 52, 38 Am. & Eng. R. Cas. 677. See also, as establishing a similar rule in regard to contracts to influence the location of the road, *Pixley v. Gould*, 13 Ill. App. 565; *First Nat. Bank v. Hendrie*, 49 Iowa, 402, 31 Am. Rep. 153.

FLAGG

v.

DETROIT & CANADA GRAND TRUNK JUNCTION R. CO.

(96 *Michigan*, 30.)

Frightening Horses at Station—Duty to Erect Screen.—Where there was no statutory duty imposed upon a railroad company to place a screen along the side of its tracks at a station, and it was apparent that a screen or fence at that point would be a great inconvenience to the company, and to the public generally, the railroad company could not be held liable for injuries caused by a horse becoming frightened at the defendants's engine, although a screen at such a point might have prevented the accident.

Same—Contributory Negligence.—In this case the plaintiff had solicited a ride with two young boys, who were driving a four-year old colt, which had never before been at the railroad station. While the boys were loading trunks into the wagon, the colt became frightened at the noise of an approaching train, and the plaintiff requested the boys to drive him away from the station, as she was afraid, but remained seated in the wagon, although she had time to alight before the train approached. Upon the approach of the train the horse broke loose from his drivers and ran away, throwing out the plaintiff and inflicting upon her severe injuries. *Held*, that the plaintiff was guilty of contributory negligence so as to prevent recovery.

ERROR to St. Clair circuit court.

E. W. Meddaugh (*O'Brien J. Atkinson*, of counsel), for appellant.

J. B. McIlwain (*H. E. Chadwick*, of counsel), for appellee.

LONG, J.—Plaintiff lives at Lakeport, about 10 miles from Port Huron. On the day of the accident she was returning from a visit at Port Huron to her home. She had solicited a ride with two young men by the name of Goodman, one about 19 and the other 14 years of age. They ^{Case stated.} had a light wagon, drawn by one horse. On their way they drove to Ft. Gratiot, to get from the defendant company two trunks belonging to a party in Lakeport, and for which they had the checks. The horse they were driving was four years old, but well broken. Neither of these parties had ever been at the depot at Ft. Gratiot, and the horse had never been driven there. The situation of the streets, railroad tracks, and buildings of the defendant company is shown by the accompanying plat.

They drove down Michigan street to the tracks, and before turning into the depot-grounds the older of the two boys got

out of the wagon, went to the baggage-room, saw the baggage-man, who took the checks, and delivered him the two trunks, telling him to drive up to the platform to get them. He put them on a truck and wheeled them out to end of the platform, near the train dispatcher's office, and then returned for his horse and wagon. The horse was driven over the first line of tracks through the driveway, and turned round, backing the end of the wagon to the north end of the platform, and opposite the train dispatcher's office. The older boy got out of the wagon, leaving the plaintiff and his brother in the wagon. The horse became restless, and the younger boy got out and took him by the bits. He began to rear, when the older boy went to his head. The horse finally started and ran northward, and, swinging to the right across the tracks, overturned the wagon, throwing the plaintiff out, breaking her leg, and otherwise injuring her. The horse became frightened and unmanageable from the noise of an approaching train coming from the rear, and along the track on the east side of the depot. This action was brought to recover damages for the injury thus sustained by the plaintiff, and on the trial she had verdict and judgment for \$2000.

The breach of duty alleged in the declaration is that if the defendant had taken proper precaution to protect life and property against such apparent danger as the operating of engines and cars along said mentioned switch-tracks, it would have constructed and maintained a high board fence along the westerly side of its main switching-tracks from said passenger, freight, and baggage platform, at the southerly end of said building known as the "dispatcher's office," etc.; or, had said defendant kept an employé or servant at said platform to warn strangers coming there with horses to receive or deliver freight or baggage, or to assist in holding such teams, or maintained hitching-posts or rings for hitching horses, the accident would not have happened. The breach of duty assigned is as follows: "But, on the contrary, said yard, on the easterly side, and adjoining said main switching-tracks, is wholly unfenced, and said tracks laid level with said yard for the whole distance, and has so existed for more than a year past; while passengers desiring to take said railroad train, or receive or deliver freight from or to said railroad, or to receive or deliver baggage transported over said railroad, are compelled to go by the route aforesaid through the yard aforesaid to said platform as the only means of access for such purposes." There is another allegation of negligence in the declaration, but which seems to have been abandoned on the trial. It was claimed by the declaration that the train was propelled along the tracks with great speed, and without any

warning to the plaintiff or those in charge of the horse. On the trial, when proof was offered of this fact, the court stated to counsel that he did not understand that in the operating of the train there was any negligence alleged; and counsel for plaintiff agreed with the court's views, so that we may consider that question settled and out of the case. The only questions, therefore, for our consideration are (1) whether it was negligence on the part of defendant, under the circumstances, not to have built and maintained a fence along the side of these switch-tracks; and (2) whether the plaintiff was in the exercise of due care.

The court below, upon the first question, directed the jury if they found that the want of such a barrier left the station-grounds in a condition not reasonably safe, and plaintiff's injury would not have taken place except by reason of such insufficient condition, plaintiff and the Goodmans being in the exercise of due care, the plaintiff was entitled to recover. We think this charge was not warranted. Counsel for defendant had asked the court to instruct the jury substantially that the defendant was not bound to fence its depot-grounds. This instruction should have been given. It was shown by the testimony of the station-agent, and not disputed, that these grounds east of the dispatchers' office and north to Neil creek are used for passengers to get off and on trains; also for conductors leaving trains to go to the dispatchers' office for orders; it is also used by conductors of switch-engines to mark the string of cars to be disposed of. It is used by the general public in going to and from the ferry-boats plying every 15 minutes from that side of the river to Point Edward, on the opposite side. It appears that it is necessary to have that point open so that the dispatchers may have a view of the yard and of the arrival and departure of trains, and that a fence there would hinder and obstruct the making up and working of trains. On the east side of these tracks, and below the dispatchers' office, are two slip-docks, where the trains are run onto the transfer-boats to be carried across the river, and frequently from five hundred to a thousand cars a day are in the yard to be carried over, or have arrived in the yard from the other side of the river. The passageway for teams from Michigan avenue to the end of the platform opposite the dispatchers' office varies in width. Opposite the storehouse it is 79 feet east to the tracks, while opposite the dispatchers' office it is 27 feet to the tracks from the platform. Across the tracks the ground is made level and smooth for people to pass over, hundreds of whom pass daily. So far as appears by this record,

Duty of rail-
road company
to erect screen.

people have driven their teams in there with safety. In a vast number of railway stations nearly the same state of things exist. Carriages and wagons come to these stations to meet arriving passengers. They draw up and wait the arrival of the trains within a few feet of the track, and trains arrive and depart; and no one, so far as my examination has extended, has ever heretofore suggested that a railway company is guilty of negligence in not erecting a screen or fence so that horses standing there may not become frightened at approaching trains, except in the case of *Simkin v. Railroad Co.*, reported in 21 Q. B. Div. 453. It appeared in that case that the plaintiffs were leaving a station belonging to the defendant, in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station, which was blowing off steam. The horse upset the carriage, and the plaintiffs were injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient; but the jury found that the defendant was guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. It was said by the court: "We cannot think that in this case there is any evidence that ought to have been left to the jury of negligence by the defendant in not sufficiently and properly screening its railway from the road."

There is no statutory duty cast upon the defendant to place a fence alongside of its tracks, and it is quite apparent that it would not only be a great inconvenience to have such a fence there to the defendant company, but to the public generally. The duty which the defendant owed to the plaintiff was to provide a reasonably safe place of ingress and egress to its station. Negligence would mean the omission by the defendant to do something which persons conducting a railway with reasonable care and caution should do. It cannot be said in this case that there is any such omission of duty. So far as our observation extends, no railroad company has heretofore found it necessary, in the careful management and conduct of its business, to place fences or screens along its tracks for the purpose of preventing the frightening of horses approaching its station. Where passengers are accustomed to be received upon a train, whether at the station-house, at the water-tank, or elsewhere, railroad companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train, and the latter have the right to assume that the grounds adjacent to the car, within the limits in which persons necessarily and

naturally go to and from them, admit of their getting safely out and in, even on a dark night; and passengers have a right to assume that no pitfalls are left near the travelled way. In such cases it might be necessary to erect barriers to prevent persons from wandering in the dark out of the travelled way, and falling into pits and getting into dangerous places. Such are the cases cited by plaintiff's counsel. *Hulbert v. Railroad Co.*, 40 N. Y. 145; *Cross v. Railway Co.*, 69 Mich. 363, 35 Am. & Eng. R. Cas. 476. But this case is not within the rule laid down in the cases cited.

2. The plaintiff's own testimony shows that not only were the Goodman boys guilty of negligence in attempting to keep the horse at the platform when it became restless at the noise of the train approaching from the rear, but the plaintiff saw and knew the danger herself, and could have avoided it by the least care on her part. She says she saw the railroad tracks there, and, after the horse had been backed up to the platform, she says she told the boys to hurry up, as she was afraid. She had not seen or heard any train at that time, but saw the track, and was afraid with the little boy in the wagon with her. She had plenty of time to alight from the wagon before any train was heard. After the train was heard, she says, if the boy had done as she told him, he would have driven out, as that was what she would have done. There was nothing unusual in the noise of the train. The horse became restless from the noise of the train before it was in sight, yet the boys, instead of driving out, attempted to hold him there; and the plaintiff, knowing the danger, kept her seat in the wagon. The boys knew the way out, and from the point where they stood it was a smooth driveway from 30 to 100 feet in width, safe to drive over. It appears that the horse first became restless and frightened from the noise, and not from the sight of the train; and yet with a four-year old colt, which had never been driven there before, they determined to try and hold him by the head rather than drive out. The case falls precisely within the rulings of this court in *Geist v. Railway*, 91 Mich. 448. In that case the driver thought he could get across the track in front of a car going 12 to 15 miles an hour, whipped up his horses to do so, and was struck by the car. This was held to be negligence. In the present case, the plaintiff and the Goodmans saw the danger, knew they had a young colt not accustomed to the place, and that there was a safe way out. Instead of adopting a safe course, they took their chances that they could hold the colt, and let the train pass. They miscalculated the chances, and must suffer the consequences.

We see nothing in the case warranting a new trial. The

verdict and judgment below must be reversed. No new trial will be ordered. The other justices concurred.

Frightening Horses at Station.—*Horses Left by Owner in Care of Another.*—In *Fritts v. New York & N. E. R. Co.* (Conn., March 6, 1893.), 26 Atl. Rep. 347, it was held that the defendant's negligence was a question for the jury, and a finding that the defendant was negligent would not be disturbed, where the plaintiff, a hackman, left his horses in charge of a fellow-hackman, at a point near the station, the usual place for waiting designated by the company, and an engineer brought his engine near this place and blew several very loud blasts of the locomotive-whistle, which frightened all of the horses, though accustomed to the noise of trains where it appeared that the engineer continued to sound the whistle after he saw that the plaintiff's horses were running away and injuring themselves and the hack; and the mere fact that the plaintiff left his horses unhitched and in the charge of another could not, as a matter of law, charge him with contributory negligence.

Measure of Damages.—In *Fritts v. New York & N. E. R. Co.* (Conn., March 6, 1893.), 26 Atl. Rep. 347, it was held that evidence of the loss of the use of the plaintiff's horses for a length of time, and what he might have earned with them, without any evidence as to what he ought to have earned without them, by securing another team or getting other employment, furnished no basis for computing his loss. *Held*, also that loss in the market value of the horses was a proximate result of the injury which the plaintiff could recover. In this case the court said: "Two questions are presented, raised upon the following finding: 'The market value of said horses was lessened in consequence of said runaway fifty dollars for each horse. The plaintiff was earning in his business, at the time of the accident, seven dollars each day, and he would doubtless have continued to earn at approximately the same rate but for the accident for the seven weeks next following; but in consequence of the accident he did not, and could not use the horses or carriage during the seven weeks next following the accident. And the plaintiff claimed that he was entitled to recover the lessened market value of the horses, and also the money which he would have earned but for the accident. The court overruled these claims of the plaintiff as being too remote and uncertain, and the plaintiff duly excepted. We think the court was correct in its ruling as to the plaintiff's prospective earnings. Conceding the point, claimed by the plaintiff that where personal property is injured, and not destroyed, the value of the use during the time that the owner was necessarily deprived of it may be recovered, neither the decisions to this effect nor the principles upon which they are based assist the plaintiff to establish his present contention. He did not show or seek to show the value of such use. Whether the fact which the court has found is admissible as evidence tending in any degree to prove the value of such use of the horses and carriage we need not decide. It is evident that it is not itself such value—that is, it is not the rule of damages—and the plaintiff offered no other evidence and made no other claim. Indeed, the mere proof of what he might have earned by the use of the property, with nothing to show what he might and could and should—indeed did—earn without it, by procuring another team, or in other employment—'the value of the plaintiff's time to himself'—furnishes very little information concerning the plaintiff's real loss, whether the same be considered proximate or remote. But we think that the lessened market value of the horses in consequence of the runaway was a proximate and legitimate element of damage, and that the court practically, though not expressly, so held in the case of *Clinton v. Howard*, 43 Conn. 294."

LONERGAN

v.

ILLINOIS CENTRAL R. Co.

(Iowa Supreme Court, Oct. 10, 1891.)

Frightening Horses at Station near Crossing—Liability of Railroad under Statutory Requirement to Signal at Crossings.—Under the statute imposing a duty upon a railroad company to ring a bell at highway-crossings, and making the neglect of such duty a misdemeanor punishable by fine, and declaring that the company shall "be liable for all damages which shall be sustained by any person by reason of such neglect," a person who was unloading corn into a crib on the railroad company's depot-ground near two highway-crossings can recover from the company for injuries received by reason of his horses becoming frightened at an engine which was driven past, without the required signal being given, although the plaintiff was not at the time attempting to cross the track.

APPEAL from Floyd district court.

J. S. Root, for appellant.*W. J. Knight*, for appellee.

BECK, C.J.—1. The undisputed facts of the case are these : While the plaintiff was rightfully engaged in unloading corn from his wagon into a crib upon defendant's depot-ground near the railroad track, an engine passing on the railroad frightened defendant's horses hitched to the wagon, causing them to run away, throwing plaintiff from the wagon, thereby inflicting personal injuries, to recover for which this suit is brought. The crib in which defendant was unloading the corn was near two highway-crossings upon defendant's road, over which the engine ran without the bell thereon being rung. Upon these facts the court directed a verdict for defendant by an instruction in the following language: "You are instructed in this case, the evidence of the plaintiff, which is undisputed, shows that at the time the plaintiff's team started to run, and he was thrown from the wagon and injured, he was unloading a load of corn at the corn-crib, near the defendant's station-house, and was not attempting to cross the railway, or using a highway for the purpose of travelling thereon. Under these circumstances, I charge you that the failure to ring the bell, as charged in the petition, does not constitute negligence on the part of defendant, for which it can be held liable in this action, and that the statute requiring a bell to be rung approaching public

crossings does not apply to this case, and your verdict should be for the defendant." Upon this instruction arises the only question in the case.

2. Chapter 104, Acts 20th Gen. Assem. (Miller's Code, 471), provides as follows: "That a bell and a steam-whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be twice sharply sounded at least sixty rods before a highway-crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; providing that at street-crossings within the limits of incorporated cities or towns the sounds may be omitted, unless required by the council of any such city or town; and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect." Section 2: "Every officer or employé of any railway company who shall violate any of the provisions of this act shall be punished by fine, not exceeding one hundred dollars, for each offence." The statute imposed the duty upon the person operating the engine to ring the bell while the engine was passing the place where plaintiff was unloading his corn, and makes the neglect of such a duty a misdemeanor punishable by fine, and declares that defendant shall "be liable for all damages which shall be sustained by any person by reason of such neglect." The failure of defendant's employés to perform the duty to ring the bell, imposed upon them by statute, was negligence, under the familiar doctrine of the law. *Correll v. Railway Co.*, 38 Iowa, 120; *Shear & R. Neg.* (3d ed.), section 13a. It will be observed that the bell is to be rung at the crossings. It may be presumed that the statute is intended to warn persons at the crossings of the approach of the cars, and thus enable them to avoid the engine. But the signal enables all persons who may be exposed to danger by the approaching engine to escape it, and such persons may rely upon the discharge of the duty required by the statute, as in all other cases, and act accordingly. It is therefore plain that plaintiff sustained injury by the neglect of defendant's employés in omitting the signal, and may recover therefor. It cannot be doubted that when one may rely upon the discharge of a duty imposed by law upon another, and is injured by the negligent omission of that duty, he may have an action therefor against the person guilty of the negligence. It is not the case of negligence in the performance of a contract for the transportation of persons and property, but it is negligence by reason of the omission of a duty imposed by statute. The negligent omission was inherently wrong, for it is in violation of the statute, and is a misdemeanor, and it endangered life

and property of all persons exposed to the danger of a passing engine without the signals required by law. It is plain that all persons exposed to the dangers and suffering from the effects of such negligence may recover therefor. *Shear & R. Neg.*, section 54.

3. The instruction of the court below, directing the verdict, seems to be based upon the thought that no one is entitled to protection against the negligence of omitting to ring the bell, except persons who were using or about to use the highway-crossing. This would be true only in case the negligence was the omission of an obligation or duty raised by contract, express or implied, or imposed by special relations of the parties. But the case is one where the negligence causing the injury arises by reason of the violation of a statute which declares the negligence to be a misdemeanor. In support of these views, we cite *Wakefield v. Railway Co.*, 37 Vt. 330; *Railway Co. v. Raiford* (Ga.), 9 S. E. Rep. 169; *Railroad v. Williams*, 74 Ga. 723; *Railway Co. Young* (Ga.), 7 S. E. Rep. 912; *Ranson v. Railway Co.* (Wis.), 22 N. W. Rep. 149. Cases are cited by counsel for defendant in support of views in conflict with our conclusions. Some are to that effect; but we are clearly of the opinion that they are in conflict with principle. Other cases cited by counsel are not in conflict with our conclusions in this case.

In our opinion, the district court erred in giving the instruction directing a verdict for defendant. Its judgment, therefor, ought to be reversed.

ON REHEARING.

ROTHROCK, J.—A petition for rehearing was granted in this case, and we have again examined the question involved in the light of reargument by counsel for the respective parties. It is claimed in the petition for rehearing that the cases cited in the opinion as sustaining the conclusion reached are not in point. It rarely occurs that cases are exactly alike in their facts. This can occur only when the cases arise out of the same transaction. But there are a multitude of adjudged cases which are so nearly alike that the same legal principles may be applied in deciding them. It is important that we keep in mind the precise relation that the plaintiff in this case sustained to the railroad company. He had driven his wagon loaded with corn upon the station-ground for the purpose of placing the load in a crib, that the corn might be shipped on the defendant's road. It is a matter of common knowledge that grain-elevators, corn-cribs, coal-sheds, and, in

Application of
cases cited.

some instances, lumber-yards, are located on station-grounds of railroads. Every team which is driven upon the grounds for the purpose of loading or unloading grain or other freight received or to be shipped on the railroad must be regarded as on the depot-ground by the invitation of the railroad company. It is an absolute necessity that they should be there to transact their business; otherwise, the railroad company could not transact the business of a common carrier. In the case of *Wakefield v. Railway Co.*, 37 Vt. 330, the plaintiff had driven his team over a highway-crossing and along a public road, about 35 rods south on the highway, parallel with the railroad, when a train going north frightened his horses. The negligence charged was that the crossing-signal was not given. The question was whether, after having passed the crossing, a duty was due to him to give the signals. The court held that the purpose of the law is to secure as much safety as could be done by notice of the approach of an engine against accidents by reason of such crossings. But the court said: "While such accidents are in the main likely to happen to persons approaching and about passing such crossings, yet they are not confined to such persons, and we think it would be an unwarrantable restriction of this provision of the statute to hold that the duty thereby imposed has reference only to persons approaching or in the act of passing the crossing. In our judgment, that duty exists in reference to all persons who, being lawfully on or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place."

In *Railroad v. Williams*, 74 Ga. 723, the case and question decided are well and tersely stated in a head-note, as follows: "Where a person injured by a railroad train was walking on the track without the permission of the company, and had passed beyond the crossing of a public road about 200 yards, when he was injured by a train coming up behind him, a non-compliance on the part of the company with the law in regard to the duty of railroad companies in respect to the erection of blow-posts, and the blowing, and continuing to blow, the whistle, and the checking, and continuing to check, the speed in running, may go to the jury as a circumstance showing negligence." This case was approved in *Railroad Co. v. Rairford*, 82 Ga. 400, 37 Am. & Eng. R. Cas. 481. In *Ransom v. Railroad Co.*, 62 Wis. 178, 19 Am. & Eng. R. Cas. 16, it was held that a statute similar to that in force in this state was designed to guard against danger of injury from the frightening of teams travelling upon the highway or crossing, as well as the danger of actual collision at the crossing; and a railroad company is therefore liable for injuries caused by a fail-

ure to comply with that statute to persons travelling upon a highway parallel to the railroad, and not intending to cross the track.

Now, it appears to us that these cases are in accord with the reasoning and result reached in the foregoing opinion. Indeed, they go further in their requirements as to the duty of the company to give the signals than it is necessary to go in the case at bar. In *Williams' Case* the plaintiff was in no manner connected with the railroad company, and his position had no relation to the crossing, or to travel on a parallel road. He was walking on the railroad track without the permission or invitation of the railroad company. In the other cases the parties were not approaching a crossing, nor intending to cross, but were travelling lines of road parallel with the railroad. In the case at bar the plaintiff was upon the depot-grounds, where it was actually necessary that he should be, to unload his corn, that the defendant might conveniently receive it and ship it to market. In the case of *Cahill v. Railway Co.* (Ct. App. Ky.), 49 Am. & Eng. R. Cas. 390, it was held that persons lawfully using a private crossing are entitled to the benefit of signals which they know it is the duty and custom of the railroad to give at public crossings, and for failure to give such signals, negligence as to such persons will be imputed to the railroad company. It is to be said that there is no statute in force in the state of Kentucky requiring signals to be given, but it is held by the courts of that state that a failure to give such signal of the approach of a railroad train as would be sufficient to apprise persons at or near a public crossing of its approach is regarded as negligence. And in the recent case of *Sanborn v. Railway Co.* (Sup. Ct. Mich.), 50 Am. & Eng. R. Cas. 114, it was held by a majority of the court that the provisions of a statute requiring a highway-signal to be given inures to the benefit not only of persons on the highway, but to one injured by reason of failure to give the signal while lawfully using a private crossing at a distance from the highway. It appears to us that the last two cited cases are more nearly in principle like the case at bar than those cited in the foregoing opinion. In the case at bar the plaintiff was on the depot-grounds, unloading his corn, by the permission and invitation of the defendant, and in the cited cases the parties injured were lawfully upon the private crossings, and each had a right to suppose that the defendant's employes would obey the law of the state requiring signals at public crossings.

It is conceded in the foregoing opinion that cases cited by counsel for the defendant are, in effect, in conflict with our conclusions. These cases are again called to our attention in

the petition for rehearing. The first case presented in the petition is *O'Donnell v. Railway Co.*, 6 R. I. 211, where a party walking on a railroad-track a short distance from a highway-crossing was run over and injured, and brought suit against the company, alleging a failure to ring the bell, as required by statute, as negligence. It was held that he could not recover, because the statute was not for the benefit of persons in the situation of the plaintiff, the statute not having been enacted for his benefit. *Railroad Co. v. Feathers*, 10 Lea, 103, is a case where the plaintiff and his wife, travelling on horseback, had passed over the crossing, and travelled east on a road parallel with the railroad for a quarter to half a mile from the crossing, when a train approached from the west and frightened the wife's horse, which threw her, and killed her. It was held that the company was not liable for failure to give a crossing-signal. The reason of the decision is that the statute does not apply, because the plaintiff and his wife were riding parallel to the railroad, with no purpose to cross it. *Harty v. Railroad Co.*, 42 N. Y. 468, was another case where a party was injured while walking on the railroad track at a point 200 feet from a road-crossing. It was held that the railroad company owed him no duty, under the law, to ring the bell or sound the whistle. *Bell v. Railroad Co.*, 72 Mo. 50, 4 Am. & Eng. R. Cas. 580, was another case where a boy was standing on a railroad track 40 to 60 feet from a street or road-crossing, and was run over and killed. It was held that a statute requiring a bell to be rung at a public crossing was for the benefit of persons at the road-crossing, or approaching it, and not for one 40 or 60 feet away from it, and on the railroad track. In *Williams v. Railroad Co.* (Ill. Sup.), 26 N. E. Rep. 661, it was held that a statute requiring crossing-signals to be given had no application to a case where the plaintiff was plowing on a farm near the railroad right of way. Other cases are cited which hold that a statutory provision requiring signals upon the approach to a public crossing are for the benefit of travellers upon public highways, and not for others.

The only cases cited by counsel for appellee in which it is held that the duty to give a crossing-signal has no application to persons having substantially the same relations to the railroad company as the plaintiff in this case are *Railroad Co. v. Depew*, 40 Ohio St. 121, and *Pike v. Railroad Co.*, 39 Fed. Rep. 754. In the first-named case the plaintiff was injured while walking on the railroad track from the station to a car-load of his goods, which he was about to send over the road; and in the last-named case the plaintiff was a watchman on a railroad-bridge, and he alleged that by reason of a failure to

give a crossing-signal at a public highway half a mile from the bridge, he was caught on the bridge and injured.

It is not to be denied that there is a conflict of authorities upon the question, but it will be seen, by an examination of all the cases, that in most of them which hold that a failure to give the signal is not negligence the plaintiff bore no relation to the company whatever. He was either upon the railroad track without permission, or engaged in no duty to the railroad company, but was in a place of danger of his own choice, and for his own convenience or pleasure. Another was plowing in a field. We do not hold that a railroad company may incur liability for damages occasioned by the frightening of teams engaged in all kinds of service and employment near the railroad track because no signal is given at public crossings, by reason of which teamsters fail to secure their teams when the cars approach, and it is not necessary in this case to hold that it is negligence to fail to give the signals to travellers upon highways running parallel with the railroad. We desire to limit the general statements of the foregoing opinion to the particular facts of this case, and our holding is that the relation between the defendant and the plaintiff was such that the plaintiff had the right to rely on the defendant obeying the law in reference to giving the signal. Any other disposition of the case would be a license to locomotive engineers to approach stations, where there are always road and street-crossings, without warning by signals, no matter what injury might result from frightening teams lawfully upon the station-grounds, with persons in charge transacting business with the railroad company.

We adhere to the original opinion, and the judgment is reversed.

Who Can Complain of Failure to Give Crossing-signals.—See *Spicer v. Chesapeake & O. R. Co.* (W. Va.), 45 Am. & Eng. R. Cas. 28, and note, 36; *Shoebrink v. Canada Atlantic R. Co.* (Ont.), 37 *Id.* 462.

NORFOLK & WESTERN R. CO.

v.

ADAMS, CLEMENT & CO.

(Virginia Supreme Court of Appeals, January 11, 1894.)

Carriers—Rules and Regulations.—A common carrier may adopt and enforce reasonable rules and regulations.

Same—Charge for Detention of Cars.—A rule of a railroad company making a charge to consignee of one dollar per day per car for every such car remaining unloaded after notice of arrival to consignee and after the lapse of three days is reasonable and valid, such a rule being for the protection and benefit of the public and to secure prompt movement of freight cars, as well as for the protection and benefit of the carrier.

Statute Construed.—Such a rule does not come within the purview of sec. 1202-3 of the Code of Virginia, of 1887, which sections provide that no charge other than that provided by law shall be made for transportation, storage or delivery of freight, nor do such sections invalidate the rule.

LACY and HINTON, JJ., *dissenting*.

ERROR to Roanoke circuit court.

Assumpsit to recover certain sums of money alleged to have been illegally exacted from Adams, Clement & Company.

Kirkpatrick & Blackford, and *Watts, Robertson & Robertson*, for plaintiff in error.

Pugh & Moffett, for defendant in error.

FAUNTILERoy, J.—The petition of the Norfolk & Western Railroad Company complains of a judgment of the circuit of Roanoke county, rendered therein at the April term, 1893, in favor of Adams, Clement & Co., against the said

Case stated—
Action of
assumpsit.

Norfolk & Western Railroad Company for the sum of \$488, with interest thereon from September 1, 1891, until paid, in which suit the said Adams, Clement & Co., are plaintiffs and the petitioner is defendant. The suit is an action of *assumpsit* against the Norfolk & Western Railroad Company to recover back certain sums of money alleged to have been illegally exacted from and paid by the said Adams, Clement & Co., to the said Norfolk & Western Railroad Company, and a verdict was rendered and a judgment entered for the full amount of the plaintiff's claim. The case is here upon a writ of error obtained by the defendant company.

The Norfolk & Western Railroad is a common carrier, owning and operating a line of railroad in the state of Virginia,

and the town of Salem is upon the said line. The plaintiffs are lumber-dealers, doing business at the said town of Salem; and between February 16 and August 31, 1891, they received a large number of shipments of lumber in carload lots, consigned to them from points on the line of the said Norfolk & Western Railroad, and from points in the state of Virginia, and other points in other states. These shipments were made with the understanding and agreement that the lumber was to be unloaded by the consignee at Salem depot upon the arrival of the shipments at that point. The railroads of Virginia and of other states, for their own protection as well as for the protection and benefit of the public, have a car-service set of rules, designed and enforced to secure the prompt movement of freight cars; and under the rules of this car-service association the Norfolk & Western Railroad Company have a charge of one dollar per car per day for the use of their cars and their side or switch-tracks for every day that the cars remain unloaded after notice of their arrival to the consignee and the lapse of three days. Under the abuses that prevailed previous to the establishment of this rule, serious loss and inconvenience were caused both to the shipping public and the railroad company by the unreasonable and protracted delay of consignees in unloading the cars; the railroad company being unable thereby to furnish cars when called upon by shippers of freight, and their side-tracks being encumbered, and the movement of freight impeded, causing heavy expense, and a demand for more track room to accommodate idle cars standing unloaded upon their tracks, and the company being unable, therefore, when called upon, to furnish cars for the shipping public.

The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an encumbrance. If A. be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B. it is evident that both the railroad company and the shipping public will suffer injury. The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of cars long before the commencement of the account sued upon; and they knew and agreed when the shipments were made that such a charge would be made, unless they unloaded their cars in compliance with the rule of the company which gave to them 72 hours in which to unload their freight after

notice of the arrival of the cars which they had stipulated to unload.

It is well settled in this state and in other states that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or as shippers. See *Railroad Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; *Railroad Co. v. Harman's Adm'r*, 84 Va. 553. That this rule is reasonable and proper, and that the railroad company can make such a charge, has been decided in a number of states; the question never having arisen before in this state. See *Miller v. Banking Co.*, 88 Ga. 563, 50 Am. & Eng. R. Cas. 79; *Miller v. Mansfield*, 112 Mass. 260; *Railroad Co. v. Cooke*, 50 Am. & Eng. R. Cas. 89, note; *Kentucky Wagon Manuf'g Co. v. Louisville & N. R. Co.*, 50 Am. & Eng. R. Cas. 90, note; *Chicago, M. & St. P. R. Co. v. Pioneer Fuel Co.*, Beach, Ry. Law, § 924, and cases there cited; *Jones, Liens*, § 284, and cases cited; 4 Lawson, Rights, Rem. & Pr. p. 3146, §§ 1831, 1832; Wood, Ry. Law, pp. 1592, 1593, 1600; 2 Wat. Corp. pp. 245, 246; 2 Amer. & Eng. Ency. Law, pp. 878-881, and notes; Redf. R. R. (6th ed.), pp. 67-83. In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various states. In Texas the railroad commissioner, Judge REAGAN, after full investigation, made an order fixing \$3 per day per car as a reasonable charge for delay in unloading after 48 hours' notice. The railroad commissioners of Illinois, and those of other states, after full investigations, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such charge is apparent.

It is contended, however, that the sections of the Code of Virginia of 1887, 1202 and 1203, make such a charge illegal; and the judge of the trial court took the view of the plaintiff, and instructed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not. We think that the trial court erred in so holding, and in so instructing the jury. The charge made by the railroad company for the detention of its cars, and the occupation of its tracks after due notice, and the allowance of three days to the consignees to unload the cars and disencumber the track, is not within the purview, purpose, or prescription of the

statute, and is not of the character of weighing, storage, and delivery of articles of freight contemplated by the makers of the statute. The charge is not for transportation, storage, or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by a schedule; but it is for the use and occupation of the cars, and the obstruction of their tracks by the consignee, for weeks and months after the contract for transporting and delivering the freight had been fulfilled and ended. It is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire, and can make reasonable rules and regulations and charges for such service as bailee, as it may see fit. Such charges are not carrier charges in the meaning, intentment, or prescription of the statute.

Carrier as
bailee for hire—
Charges for
detention of
car.

Under the head of "Carriers," the American & English Encyclopædia of Law (page 880, vol. 2): "A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases; and the consignor [consignee], with notice thereof, will be bound. Whether such terms are or are not is an irrelevant inquiry." In a note to this section is the following: "We can see no reason why a railroad company, as a common carrier, cannot stipulate, by a contract express or implied, that their liability as carrier shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business." Hutchinson on Carriers (see section 378) says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he

continues liable for their safekeeping as the hired bailee of the owner."

The record in this case shows that at the time of the shipments of this lumber the plaintiffs knew that there was a depot at Salem for the ordinary business of the company, but not for the accommodation of carloads of lumber; and that, if they did not unload the cars, according to the contemplation of the contract, within seventy-two hours (exclusive of Sundays and holidays) after one day for placing the cars and notice, they would have to pay one dollar per car, per day, thereafter; not for transportation and delivery, but for the detention of cars, and use and occupation of the tracks of the railroad company. The statute provides solely for the transportation, storage, and delivery of freight to the carrier, to be shipped by it, and delivered at the other end of the journey to the consignee; but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according to such contract as the carrier and the customer may make, express or implied. "A railroad company is not required by law to keep a warehouse or depot at every station along its route or line, and it may stipulate either expressly or by implication, that it will assume no liability as warehouseman at a flag-station where it has no depot or agent; and when the consignee is fully advised, at the time of the shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side-track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of one dollar a day for the unreasonable, and even long-continued, detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public, and a stimulus to the consignee to unload the car, and disencumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of one dollar per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record shows was done in this case, in some instances), without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer.

In view of the authorities and the facts of this case, we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company, and was due to it by the plaintiffs, Adams, Clement & Co., and that

they had no right to recover it back; and that the circuit court of Roanoke county erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled; and this court, proceeding to enter such judgment as the circuit court ought to have entered upon the pleadings, will dismiss the plaintiffs' suit. Reversed.

LACY and HINTON, JJ., dissenting.

Demurrage Charges—Right of Railroad Companies to Impose for Detention of Cars.—Since the note was written appearing on p. 88, of 50 Am. & Eng. Cas., a number of authorities have affirmed the rule established by preponderance of the authorities there cited. The principal case lays down the rule that a railroad company may as a common carrier and by virtue of a common carrier's common-law rights adopt and enforce a rule making a reasonable charge for detention of its cars by consignees beyond a fixed time-limit. The case places the rule on the stable foundation that public policy and an expeditious public service require the return of railroad cars without undue delay. As has been said by the courts a common carrier cannot satisfactorily perform its important duties to the public if consignees are permitted to retain indefinitely, and without a restraining penalty, possession of the carrier's cars, thus obstructing the carriers tracks and yards as well as depriving it of the use of its cars. Manifestly any other rule than that established in the principal case would injure the shipping public and would seriously retard the service rendered by railroads to the business of the country.

Inferior tribunals of various states have affirmed in a number of recent cases the rule laid down in the principal case.

In Ohio and Mississippi *R. C. v. Bannon* (decided by opinion of Judge EMMET FIELD, June 20, 1892, in the common pleas court of Louisville, Kentucky and not reported), it was held that a rule allowing forty-eight hours in which to unload cars and making a charge thereafter is reasonable. In Milwaukee, Lake Shore & Western R. Co. v. Lynch (decided by the circuit court of Oneida county, Wisconsin, October 15, 1892, and not reported), a rule making a charge of twenty dollars for ten days' delay in unloading one car was held reasonable, and was enforced accordingly.

In Chicago, Milwaukee & St. Paul Ry. Co. v. Pioneer Fuel Co. (decided in the district court of Woodbury county, Iowa, and not reported), a published rule, of which consignees had notice, making a charge for detention of cars beyond a stipulated time was held reasonable, and Judge VAN WAGENEN, who delivered the opinion in the case, said: "We are not compelled to resort to the maritime law for well-established principles decisive this case.

"Suppose Jones, being a farmer, should say to Smith, his neighbor, 'When you haul the next load of corn to town I will give you two dollars to bring me back a load of coal. When you bring the coal just leave your wagon by my coal-house and I will unload it.' Smith brings the coal, but Jones allows it to stand day after day unloaded. Smith informs Jones the following day that he needs his wagon to haul his corn to the market, and he has been compelled to hire a wagon at twenty-five cents per day, and that unless Jones unloads the coal within twenty-four hours he will charge him twenty-five cents a day for the use of the wagon. Would any court

say that Jones could legally answer: 'Your wagon is no seafaring vessel; you have no right to charge demurrage'! Certainly not.

"If the railroad's vehicles can thus be indefinitely tied up and converted into warehouses it will take twice or three times the number of cars to accomplish the work of transportation, and increased trackage and terminal facilities in proportion. This would necessitate a large and unnecessary increase of the capital invested and a corresponding increase of freight charges, and thus the rights of the public to an economical service would be violated. If the rule contended for by the defendants shall obtain, no reasonable man will expect the railroad company to provide the additional rolling-stock and terminal facilities for nothing, and if the parties who render the same necessary and who get the use of the cars and trackage cannot be made to pay for the same the general public will have to do so in increased freight rates. Such, however, is not the law."

In *J. C. Goff v. Old Colony R. Co.* (decided by opinion of Judge Cook, January 19, 1893, in the Sixth District Court of Rhode Island and not reported), a rule making a charge for the detention of cars beyond a stipulated time was held reasonable.

An examination of these cases leaves no doubt that such a rule when reasonable will be enforced by the courts on the ground that public policy requires the enforcement in order to prevent delays and expense to the shipping public arising from shortage of cars and obstruction of tracks and yards.

In many of the states where railroad commissions have been created by legislative enactment and their decisions are practically those of a judicial tribunal, rules making a charge for the unreasonable detention of cars by consignees have been considered by the commissioners. In view of the fact that, as Judge FAUNTLEROY observes in the principal case, such railroad commissions have for their chief object the regulation of railroad companies in the interest of the public, it is very interesting to note that where the railroad commissioners of various states have had under consideration the enforcement of such rules, they have affirmed the right to make such rules when reasonable, usually basing their decisions upon the undeniable right of the public to have an expeditious and economical service. In this connection attention may be called to the following decisions:

In *Youngblood v. Birmingham Car-service Association* (decided August 10, 1891, and not reported), the railroad commission of Alabama held that a rule making a charge to lumber-dealers of one dollar per day per car after the lapse of forty-eight hours is reasonable and should be enforced. The decision of the commission contains the following: "When the charge is made by a railroad company only for the detention of cars, and holding the side-tracks beyond a reasonable time after the arrival and notice given to consignees, such detention being by the negligence or delay by the patron, we are of opinion that a charge for such detention and use of the side-tracks reasonable in amount, is lawful, and may be properly collected by the carrying company."

In *Davies v. Missouri, Kansas & Texas Ry. Co.*, *Kansas Railroad Commissioners Report for 1891*, page 21, the commissioners decided that a rule making a charge of one dollar per day per car for each car detained after three days for unloading is reasonable.

In *Rothschild & Co. v. Chicago & North Western Ry. Co.*, *Iowa Railroad Commissioners' Reports for 1887*, page 783, the commissioners decided that, there being a great shortage of cars to move the large grain crop in the region under consideration, a rule making a charge of three dollars per day per car after the lapse of twenty-four hours is reasonable.

In *Baldwin & Stone v. Chicago Car-service Association* (April 13, 1891, not reported), a petition was presented to the Railway and Warehouse

Commission of Illinois, for a ruling on the right to charge for the detention of cars, and the petition was referred by the commission to Hon. Geo. Hunt, Attorney-General of Illinois, who, in an opinion dated April 13, 1891, sustained the right; the opinion contains the following language: "In my opinion the fixing and collecting of the charge for the detention of cars after a reasonable time for unloading is a matter for settlement only between the railroad company and the individuals interested in the freight, and is subject only to the rule that such charge must be reasonable."

It is clear, upon principle and authority, that a railroad company may enforce a demurrage charge, for detention of cars beyond a reasonable time, and that the enforcement of such a charge is in the interest of all classes of the community.

FREDERICK N. LEMARD.

CITY OF DETROIT

v.

DETROIT CITY R. Co. *et al.*

(*U. S. Circuit Court, E. D. Michigan, May 31, 1893, 56 Fed. Rep. 867.*)

Power of Municipal Corporation to Grant Street Railway Company Vested Interest in Street — Limitation of Franchise. — Under the general statutes of Michigan, and the constitution which provides that the life of a corporation, except municipal, railroad, plank road, and canal corporation, shall be limited to thirty years, a city cannot, under its general power to control and regulate street railways, grant to a street railway company the right to occupy streets for a period of time extending beyond its corporate life; it being a well-settled rule of law that, while a city may, under its legislative power of regulating the use of a street, permit a railway to be laid in the streets, it cannot by virtue of that power grant an irrevocable easement for any stated length of time.

Same—Equitable Relief to City from Consequences of Invalid Ordinance. — A city council is a trustee in the control of the streets, for the benefit of the public, and, though former trustees may have made an *ultra vires* contract, the public cannot be deprived of the benefits of ordinary equitable remedies to maintain its rights on the ground that both parties to the contract are *pari delicto*; and so, where a city council passed an invalid ordinance extending the right of a street railway corporation to occupy a street for a period of time extending beyond the limit of its corporate existence, which railway company assigned all its property and franchises to a second corporation, a subsequent ordinance fixing the time beyond which the company could not remain in the streets at the date when the corporate life of the original grantee should terminate, was valid, and the continuance of the railway tracks in the streets after the time limited would become a public nuisance, which would be removed, at the instance of the city, by the power of injunction.

Same — Estoppel of City to Deny Validity of Extension. — Res Adjudicata. — Where a city by ordinance attempted to extend the time during which a street railway company might occupy the streets of the city beyond the time when the life of the corporation would expire by law, it was not

estopped, in a suit against the railway company to compel it to abandon the streets upon the termination of its corporate existence, from denying the validity of the ordinance, by reason of the fact that the railway company had relied upon the contract provisions of the said ordinance with reference to the amount of taxes which it should pay, in an action by the city to collect taxes fixed by a subsequent ordinance, since the judgment in the former case rendered against the city did not involve the validity of the ordinance granting the said extension, and was therefore not *res adjudicata* in the case at bar.

Same — Estoppel on Account of Vested Interests. — Although the said ordinance granting such extension was accepted by both parties as valid, and quietly acquiesced in for ten years, and though the railway company expended large sums of money on the faith of the validity of the ordinance, and obligations were enforced by the city against the street railway company, which derived their binding force only from the said ordinance, the plea of estoppel was no defence in favor of the said railway company, upon whom the city council had no power to confer the grant to occupy the streets beyond the period of the corporate existence of the railway company, since those who made the investments ought to have known the statutory powers under which the city council acted.

In equity.

John J. Speed, E. A. Kent, and Benton Hanchett, for complainant.

Henry M. Duffield, John C. Donnelly, Fred A. Baker, Ashley Pond, Otto Kirchner, and Sidney Miller, for defendants.

TAFT, Circuit Judge.—This was a bill in chancery, originally filed in the circuit court for Wayne county, Mich., by the city of Detroit, against the Detroit City Railway, the Case stated. Detroit Citizens' Street Railway Company; Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company, of the city of New York. The defendants all answered in the state court, and then, on the petition of the Washington Trust Company, the case was removed to this court on the ground of local prejudice. See *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. Rep. 1. The case was heard on bill and answer.

The object of the bill was to obtain an injunction, mandatory and prohibitory, to compel the Detroit Citizens' Street-Railway Company, operating a street railway in that city, to remove its tracks from the streets, and to prevent its further running of cars after May 9, 1893. The case set out in the bill was that the easement of the Citizens' Company to occupy the streets ended upon that date, and that the easement until 1909, claimed by the Citizens' Company under assignment of mesne conveyance from the Detroit City Railway, was invalid, because the city council had no power, under the laws of Michigan, to confer an easement upon the Detroit City Railway to last beyond its corporate life, which ended May 9,

1893. The answers of the several defendants whose interests are stated below, after denying the claim of the bill that the grant to the City Railway of the easement until 1909 was invalid, and, after pleading estoppel against the city on two grounds, prayed that the answers might be treated as cross-bills; that an ordinance of the city council of 1892, purporting to repeal the 1909 grant, should be decreed invalid, as impairing contract obligations; and that the city and its officers should be enjoined from interfering with the lawful occupation of the streets by the Citizens' Company. The facts to be gathered from the answers and the bill were as follows:

By ordinance approved the 24th of November, 1862, the common council of the city of Detroit conveyed to one Wilcox and associates, their successors and assigns, who should form a corporation for that purpose, the exclusive right to construct, maintain, and operate a street railway, with a single or double track, for 30 years from the date of the ordinance, upon certain named streets of Detroit, and upon such other streets as the common council might direct, and the company assent to, in writing, provided, that if the assent of the company was not forthcoming within 30 days the council might then give privilege to any other company. The ordinance provided that the track should be laid in such a way as least to obstruct public travel; that if it should become necessary to relay the tracks, in case the city graded, paved, or repaved the streets, the relaying should be done at the expense of the company; that the company should be required to keep the surface of the streets, inside the rails, and for two feet four inches outside thereof, in good order and repair, provided that on the paved portions of the streets the materials for repaving should be supplied at the expense of the city; that the railways within the named streets should be completed within certain fixed times, or in default thereof the rights conferred would be lost therein; that the company should pay to the city, after five years, the annual license-fee of \$15 a car; and that rights conferred on Wilcox and his associates should vest, without further act or consent of the city, in the corporation they proposed to form. The ordinance was accepted by the grantees or their successors, who on May 9, 1863, organized the corporation as the Detroit City Railway, with a corporate life of thirty years.

The company built the railways required in the ordinance of 1862, and continued to operate them until 1879. In the mean time two other railway companies, under ordinances of the city, built lines of road on certain streets, after the Detroit City Railway Company had declined to do so. They were known as the Detroit & Grand Trunk Junction Street

Railway, and the Central Market, Cass Avenue & Third Street Railway. They became embarrassed, and their property and franchises were sold under mortgages, and new companies were organized to operate them. The successor of the former, the Congress & Baker Street Railway Company, was organized September 17, 1875, and the successor of the latter, the Cass Avenue Street Railway Company, was organized August 18, 1877, each for 30 years. The ordinances under which these companies operated required them, in case the city paved or repaved the streets they occupied, to repave, at their own expense, all of the portion within the track, and two feet nine inches on either side thereof, and imposed a car-license of \$25 on each double horse car, and \$12.50 on each single horse car, and a special tax for the second five years of the ordinance of 1 per cent on the gross earnings, and after that of 3 per cent.

The city became dissatisfied with the taxes it was receiving in 1879, and, after negotiating between the three companies and the city, an ordinance was passed on November 24th of that year, the validity of which was the main controversy in this action. The first and second sections of the ordinance required certain extensions on the routes of the Detroit City Railway and the Detroit & Grand Trunk Junction Railway. Section 3 repealed the ordinances of June 13, 1873, and of June 16, 1875, granting authority to the Detroit & Grand Trunk Junction Street Railway Company and to the Central Market, Cass Avenue & Third Street Railway Company to construct and operate street railways through certain streets of Detroit, and provided that the said railways, constructed and operated under those ordinances, should hereafter be subject to, and operated under, the ordinances approved November 24, 1862, and its amendments granting to the Detroit City Railway Company rights as therein set forth. The fourth section imposed a tax of 1 per cent, half-yearly, on the gross receipts of the companies, and required them to repave between the tracks when the city repaved, but not outside of the tracks, and stipulated that the tax and repaving should be in *lieu* of license and other taxes and charges for paving under existing ordinances. Section 5 provided that: "The powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance of November 24th, 1862, and the amendments thereto, are hereby extended and limited to thirty years from this date."

The ordinance was to take effect on written acceptance of the railway companies. Such acceptances were filed by the Detroit City Railway Company, the Congress & Baker Street Railway Company, and the Cass Avenue Street Railway

Company. In 1882 the two other companies conveyed all their property and franchises to the Detroit City Railway. In 1887, after an attempt by the city to collect additional taxes, upon a repeal by the legislature of a section in the incorporating act that had imposed on such railways a tax of half of 1 per cent on the capital stock paid in, in lieu of all other taxes, a compromise was effected and embodied in an ordinance, confirming the ordinance of 1879, fixing the tax, in lieu of all other taxes by the city, at $1\frac{1}{2}$ per cent on gross earnings from 1882 until 1896, and 2 per cent thereafter, and providing that the company should pay the same municipal taxes on all its lands and buildings as were imposed on individuals. The city thereafter attempted to collect, in addition to the taxes under the ordinance of 1887, taxes, under the general laws, upon the value of the tracks, horses, cars, machinery, and other personalty. In an action for the additional taxes the Supreme Court of Michigan gave judgment against the city, holding that the city was bound by the agreement as to taxes contained in the ordinance of 1887. *City of Detroit v. Detroit City Ry. Co.*, 76 Mich. 421, 39 Am. & Eng. R. Cas. 538.

From 1880 to 1889 the city council, by several ordinances, gave authority to the Detroit City Railway to extend its lines under the ordinance of 1879; and much capital was invested in those extensions, and in repaving the streets, under the obligations of, and on the faith of, the validity of the ordinance, and the duration of its grant until 1909. In January, 1890, the Detroit City Railway transferred its property and franchises, by way of mortgage, to Miller and Muir, trustees, to secure bonds amounting to \$1,000,000. In December, 1890, the Detroit City Railway Company transferred all its property and franchises to the Detroit Street Railway Company, a corporation organized for 30 years from December 1, 1890. On September 16, 1891, the Detroit Street Railway Company conveyed all its property and franchises to the Detroit Citizens' Street Railway Company, a corporation organized September 2, 1891, for 30 years, and on the same day the Detroit Citizens' Street Railway Company conveyed the same property and franchises to the Washington Trust Company, of New York, in trust, to secure the payment of \$3,000,000 of bonds. On March 29, 1892, the common council passed an ordinance, which was approved by the mayor, repealing so much of the ordinance of 1879 as extended the rights of the Detroit City Railway in the streets until 1909, and shortly after this bill was filed.

Four questions arise in this case:

(1) Did the common council of Detroit, on the 14th of No-

vember, 1879, have power to extend the rights and privileges conferred by the ordinance of November 24, 1862, for 16 years beyond the life of the corporation upon which such right was conferred?

(2) Conceding the invalidity of the ordinance, are the parties in *pari delicto*, so that a court of equity will not lend its aid to the city, by mandatory and prohibitory injunction, to restore to it the rights it parted with by an *ultra vires* act?

(3) Is the former litigation between the Detroit City Railway Company and the city of Detroit, with reference to taxation under the ordinance of 1879, *res adjudicata*, so that thereby the city is estopped from denying the validity of the extension under that ordinance?

(4) Does the investment of capital on the faith of the validity of the ordinance granting such extension, and in discharge of the obligations of the street railway company assumed as a consideration for such extension, estop the city from now seeking to annul the same?

1. The power of the city to grant the extension in the ordinance of 1879 is asserted by the defendants to exist under both the charter of the city, and also under the street railway acts.

It may be well, in advance, to settle the rule which must govern the court in construing the statutes which are claimed to confer the powers of the city with reference to street railway grants. In the first place, the street-railway laws are general statutes, affecting all street railway corporations in the state. Clearly, therefore, the peculiar hardships which one construction will work to a particular company, because it may have expended large amounts of money on the faith of the correctness of another and different construction, cannot be permitted to affect the view which the court shall take. It might be otherwise if it were shown that such a construction prevailed generally in the state, and that money had everywhere been invested on the faith of it.

In the second place, the principle of construction with respect to the powers of municipal corporations was laid down by the Supreme Court of the United States in *Minturn v. Larue*, 23 How. 435, in the words of Mr. Justice NELSON, as follows: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often followed

in the construction of corporate powers that we need not stop to refer to authorities." See, also, *Ottawa v. Carey*, 108 U. S. 110, and *Barnett v. Denison*, 145 U. S. 135-139.

The contention of counsel for defendants seems to be that the rule above stated does not obtain in Michigan, because a local self-government, which has always existed in the state, and is preserved by the constitution of 1850, gives the cities inherent power independent of the legislature, which can only regulate the exercise of that power, but cannot take away or destroy it.

The constitution of Michigan provides (article 15, § 13): "The legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and lending their credit." Article 4, § 38: "The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such power of local legislative and administrative character as they may deem proper." Article 4, § 23: "The legislature shall not * * * vacate nor alter any road laid out by commissioners of highways, or any street in any city or village, or in any incorporated town-plat."

It is quite clear from the foregoing that Michigan does not differ from other states in this: that a municipal corporation cannot exercise any power not authorized by legislative act. Michigan is, however, peculiar, in that its legislature cannot, by mandatory act or by state agents, control the administration of what are properly local affairs in cities, townships, and counties. When the legislature acts in such matters, it can only do so by conferring discretionary power upon the local corporations. In other words, the provisions of the constitution of Michigan, the peculiar effect of which has been so vigorously pressed upon the court by defendants' counsel, are merely restrictions upon the manner in which the legislature shall confer powers on municipalities, when it sees fit to do so. But the provisions do not, of themselves, create any power in the cities or other local municipal corporations. That is left to the legislature. No case cited from the Michigan Reports is in conflict with this view. See the opinion of Justice COOLEY in the case of *Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 228. There is no reason, therefore, why the strict rule of construing the powers of municipal corporations should be departed from in Michigan. We have the highest authority for this conclusion. In the case of *Taylor v. Railway Co.*, 80 Mich. 77, 43 Am. & Eng. R. Cas. 335, where the effect of a legislative grant of power to a city in reference to street railways was under consideration, Justice GRANT, speak-

ing for the Supreme Court of Michigan, said: "Municipal corporations derive their sole source of power from legislative enactments. The rule has long been unquestionably established that municipal corporations are limited to those powers which are granted—First, in express words; second, necessarily incident to the powers expressly granted; and third, those which are essential and indispensable to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. 80."

With the rule of construction thus established, we proceed to inquire what powers, if any, the city derives from its charter to authorize the laying of railways in the streets.

Charter powers
to authorize
street rail-
ways.

It is important to determine this, because, if the charter does not authorize the grant in question, then we must find the power asserted either within the four corners of the street railway act, to be hereinafter considered, or not at all. Under the charter the city council of Detroit is given power "to establish, open, widen, extend, straighten, alter, vacate, and abolish highways, streets, avenues," etc., within the city limits, and to grade, pave, repair, and otherwise improve the highways, streets, avenues, etc., "with stone, brick, or other material," and "to prohibit the encumbering of the streets," and "to prescribe, control and regulate the manner in which the highways, streets, avenues," etc., "shall be used and enjoyed." Laws 1869, p. 1692, § 22, pars. 11, 13. The same provisions were in the revised charter of Detroit of 1857 (Laws 1857, p. 73), and substantially similar authority was vested in the council under the charter of 1827 and its amendments (2 Terr. Laws Mich. pp. 345, 346, §§ 18, 20; 3 Terr. Laws Mich. p. 938, § 2). These powers are strictly legislative. What one council shall deem to be wise and do, another council, in its wisdom, may undo. If one council shall open a street, another may vacate it. If one council shall improve a street with stone, another may tear up the stone and put down brick. If one council ordains that wagons of a certain hundredweight, and with certain width of tire, may use certain streets, another council may determine that the tires must be wider or the weight less. This is regulation of the use of the streets.

The Supreme Court of Michigan has decided that a street railway, whether the motive-power be horse or electricity, is

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not an additional servitude of the street, which the abutting property-owners can enjoin, if the railway has been authorized by the legislature and the city council. *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522; *Dean v. Railway Co.* (Mich.), 53 N. W. 396. It would seem to follow that under the general power to regulate the use of the streets the city council might permit

or license a street railway company, if it has the requisite franchise from the state, to lay its tracks in the streets and to run its cars thereon. But this would only be in the exercise by the council of legislative power. The same council, or a succeeding one, might, in its discretion, revoke the license. It must be so, because it is well established that in such subordinate legislative bodies it is not permitted to one to abridge the legislative power of its successors without express sanction of law. The first council permits a railway in a street because it is of opinion that such a use will best conduce to the public interest. When another council succeeds, it may conclude that the conditions have changed; that other, more important, traffic in the street is interrupted and blocked by street cars confined to one or two rigid tracks; and that it would serve the public interests as well to have the tracks laid in a parallel street. Under the exercise of its legislative power to regulate the use of the street, unless limited or abridged, the second council could require the removal of the tracks. The fact that, if permitted by the council, the continuance of the tracks and railway there would not be an additional servitude, of which the abutting property-owners could complain, has no bearing whatever on the discretion of council to refuse to permit the continuance of such use. It necessarily follows, having regard to the strict rule of construction already discussed, that while, under its legislative power of regulating the use of the street, council may permit a railway to be laid in the streets, it cannot, by virtue of that power, agree that such a use shall continue for 30 years. This is the exercise, not of a legislative, but of a contractual, power. It is an abridgment of the legislative power by contract. It is the grant of a vested right in the streets to the railway company, whereby, for 30 years, it shall have a private ownership in tracks *in situ*, and the exclusive right to run cars over them. Never, until street cars were adopted, was such an exclusive right in the surface of the streets permitted. The power to control the use of the streets had always been in municipalities, but it had never been exercised to grant such an easement.

But it is said that the investment required would render it impossible to build a street railway, if the right to continue its use were dependent on a revocable license. That may be true, and it is a good reason why one council should be given the right to abridge the legislative power of another by contract and grant; but it furnishes no ground for saying, in the absence of such legislative authority, that a right to legislate is a right to contract. A distinction should here be taken between the right of a city to permit the laying of gas-pipes in the streets, and the laying of rails therein. The usual power

conferred in a charter, with respect to lighting cities, is that the city shall have power to provide for the lighting of streets. Under this the city may do the lighting itself, or it may contract with a company to do it, and the implication would seem reasonable that it might, by contract with a gas company, secure to the company the right to lay its pipes in the streets and keep them there for a number of years. It will be observed, however, that the usual power of the city, under its charter, is not to provide street railways. If it were, it would justify a very different implication from that founded on a mere legislative power to say how the streets shall be used. Another distinction is that the easement to be conferred, in the case of a street railway is on the surface of the street, where public travel is, while the gas-pipes are laid under the streets, and do not effect travel in the slightest degree. The ordinance in question attempts to confer the exclusive right to occupy the streets with a railway for 30 years. It is settled beyond controversy that such a right cannot exist, except by direct and express authority from the legislature. *Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. Rep. 306; *Saginaw Gas-light Co. v. City of Saginaw*, 28 Fed. Rep. 529, 16 Am. & Eng. Corp. Cas. 562; *Grand Rapids E. L. & P. Co. v. Grands Rapids E. E. L. & F. G. Co.*, 33 Fed. Rep. 659. But it may be justly said that the issue in this case does not involve the question whether the city can contract with one railway company that it will not permit another to occupy its streets, because, even if the grant of 1879 were void, so far as its exclusive character is concerned, it might still be valid to the extent of allowing the grantee to occupy the streets for the term of years named, and this would require that the relief prayed for in the bill herein should be denied. The power of the city to increase the tracks in a street so as to interfere with travel is limited (*Grand Rapids St. Railways*, 48 Mich. 433, 440), and in many streets the laying of a double track, and its use, might practically exclude any other company. But only to this extent does the exclusiveness of the grant have any bearing on the question now under discussion.

The right of a city council, under its general control of the streets, to grant an irrevocable easement for the laying of tracks and running of cars, has several times been considered by courts of last resort in this country; and the great weight of authority is in favor of the view that such power does not include authority to convey a vested right in the streets for years, or in perpetuity. Judge Dillan, in his work on *Municipal Corporations*, used this language in section 724 (4th ed.): "As respects ordinary railways operated by steam, and street rail-

Right of councils to grant irrevocable easements.

ways operated by animal power, legislative authority is necessary, to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads which connect different towns, whose tracks are constructed in the usual manner, and whose trains are propelled by steam. But it is otherwise as respects horse railways. They are for local travel, and the ordinary powers of municipal corporations are often ample enough, in the absence of express or other legislation on the subject, indicating a different intent, to authorize them to permit, or refuse to permit, the use of the streets within their limits for such purposes."

If in this, as is probable, the learned author is only referring to the fact that the use of the streets for street railway purposes is not an additional servitude, and may be licensed or permitted, in the discretion of the governing body of the city, under its legislative power of regulating the use of the streets, then he is sustained by all the authorities; but if he is to be understood as meaning that under such a power a city can irrevocably grant, for a term of years, to a street-railway company, an easement in the streets for its tracks and cars, the statement is in conflict with nearly all of the decided cases.

It is hardly probable that Judge DILLON's language is to be given the meaning claimed for it by counsel for the defendants, because in another section, in the same chapter, he emphatically approves the language of Judge COMSTOCK in the case of *Davis v. Mayor, etc.*, 14 N. Y. 506, expressly negating the power of a city council having general control and regulation of the use of the streets to make an irrevocable grant of an easement therein to construct and operate a street railway. In *Davis v. Mayor, etc.*, *supra*, and in *Milbau v. Sharp*, 27 N. Y. 611, the same resolution of the common council of the city of New York was under consideration. It purported to grant to Jacob Sharp and his associates the right to construct and operate on Broadway, in the city of New York, a double-tracked street railway. It did not contain any stipulation by the city that it would not in the future grant similar rights in the same street to other persons. Two questions arose in the case: First, had the city the right to confer the power upon the grantees named in the resolution to maintain and operate a street railway, and collect tolls therefor? and, second, had the city council the right to convey an interest in the streets by contract? It was held by a majority of the

court that, if the resolution were valid, it would confer a perpetual easement in the streets. Judge COMSTOCK was of the opinion that the city had the right, by revocable license, under its general control of the streets, to permit a street railway to lay its tracks and run its cars, but that it had no power, by contract or grant of a vested easement, to abridge its legislative control over the streets. WRIGHT and JOHNSON, JJ., were of the opinion that, while the resolution was invalid as a contract, it was valid as a license revocable at pleasure, while the other five judges, including DENIO and COMSTOCK, held that the resolution was void for the reasons given by COMSTOCK, J. In *Milhau v. Sharp* it was held (Judge SELDEN delivering the opinion) that the resolution was objectionable, both because it created a franchise which could only come from the state, and also because it involved the grant of an interest in the street, and a consequent abridgment of the future legislative power of the city to regulate the use of the streets. See, also, *People v. Kerr*, 27 N. Y. 188, and *Coleman v. Railroad Co.*, 38 N. Y. 201. The effect of these cases cannot be explained away by the perpetual character of the grant therein contained.

They do and must rest on the principle that the power to make an irrevocable grant, either for years or forever, is not conferred on the city, under its general legislative power. This is apparent from the language of Mr. Justice CLIFFORD in *People's Passenger R. Co. v. Memphis City R. Co.*, 10 Wall. 38, where, after discussing the want of power in the municipal corporation to grant franchises for 25 years, he said: "Such corporations are usually invested with the power to lay out, open, alter, repair, and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct, and maintain for a term of years, a railway in one of the streets of the municipality, for the transportation of passengers for private gain, and that resolution or ordinance of the authorities granting such a right is void." Citing *Milhau v. Sharp*, 27 N. Y. 611; *People v. Kerr*, *Id.* 188; and other cases, the learned justice continued: "Special powers are given to such corporations to lay out, open, and repair streets, as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require; and the general rule is that those powers cannot be delegated to others, nor be effectually abridged, by any act of the municipal corporation, without the express authority of the legislature."

The same principle has been announced in *State v. Trenton*, 36 N. J. Law, 79; in *Louisville City Ry. Co. v. Louisville*, 8

Bush, 415, 421; in *Covington St. Ry. Co. v. Covington*, 9 Bush, 127; in *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 5 Am. & Eng. R. Cas. 274; in *Denver & S. Ry. Co. v. Denver City Ry.*, 2 Colo. 673; *Memphis City R. Co. v. Memphis*, 4 Cold. 406; and in *Nash v. Lowry*, 37 Minn. 263; and *Boston v. Richardson*, 13 Allen, 146, 161.

The only cases brought to the attention of the court, in which a different doctrine has been announced, are *Brown v. Duplessis*, 14 Iowa, Ann. 842, and *State v. Corrigan Consolidated St. Ry. Co.*, 85 Mo. 274, 29 Am. & Eng. R. Cas. 591. In the first of these the Supreme Court of Louisiana held that a city might sell an easement in its streets to an individual for a term of 20 years, to construct, maintain, and operate a street railway, under its general power to regulate the use of its streets; but it should be said that there was a statute in Louisiana providing that no railroad, plank-road, or canal should be constructed through the streets of any incorporated town without the consent of the municipal council, and this was held by the court to imply the power by the council to give a consent in the nature of an easement. In *State v. Corrigan Consolidated St. Ry. Co.*, 85 Mo. 263, 29 Am. & Eng. R. Cas. 591, the Supreme Court of Missouri held that, where a street railway was incorporated by special act for the purpose of constructing and operating a horse railway over the streets of Kansas City, the city had, under its general charter, power to open, grade, and improve its streets, the authority to grant to the street-railroad company the right to construct and operate a street railroad on the various streets of the city for the period of 20 years. Of the cases cited in the opinion, only *Brown v. Duplessis*, already referred to, supports the doctrine. Moreover, it is to be said, in regard to the Missouri case, that the special act authorizing the construction of a railroad in the streets of Kansas City gives the case a somewhat peculiar phase, for it might be strongly argued that the act conferred, by implication, upon the city, the power to consent to the railway's construction and operation, because the legislature would hardly, by special act, create a corporation to do that in a city which, under the laws of the state, the city would have no power to agree to.

The case of *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 661, is relied on by defendants, but it by no means supports their claim. There the Supreme Court of Kansas held that a steam-railroad company could be enjoined from interfering with a street railway laid in the street of a city, which, without other power than that involved in the general control of the streets, had passed an ordinance purporting to give the proprietors of the railway an exclusive easement in

the streets for a term of years. Justice BREWER put the decision on the ground that the railway was lawfully in the street under the license of the city, and expressly disclaimed a purpose to decide that a vested interest in the streets could be conferred by the city for years. See, also, *Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. Rep. 306. The question has never been expressly passed on by the Supreme Court of Michigan. In the case of *Taylor v. Railway Co.*, 80 Mich. 47, 73 Am. & Eng. R. Cas. 335, however, the question was how far the village of Bay City might, in its grant to a street railway of the right to use its streets, secure to the railway company as by contract the right to lay the track, without payment of damages to abutting property-owners, and thus exempt the company from a liability to abutters for damages imposed by a charter given to the city subsequent to the railway grant. The power to create such exemption by contract was claimed under the general power of the city (then the village) of Bay City to lay out and establish, vacate, open, make, and alter such streets as it might deem necessary for the public convenience; and Justice GRANT dismisses the claim with the significant remark, "No mention is made in the act of tram or street railways."

It follows from what has been said that the power to make the grant relied on by defendants in this case must be found in the tram or street-railway acts, or not at all, and we may now proceed to examine that legislation:

The original tram-railway act of 1855 provided for the organization of companies to construct a railway from one town to another, not upon streets, but upon private property to be acquired by purchase or condemnation. The intention of the act evidently was that the tracks should be used by members of the public, with their own cars or carriages, upon payment of tolls fixed in the act. The motive power was limited to that of the horse or other animal. The corporators were required to file articles of association, stating, among other things, the duration of the corporation, which should not exceed 30 years. In 1861 additional sections were added, as follows: "Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in the state. Sec. 34. All such companies formed for such purposes shall have the exclusive right to use the same, provided, however, that no such company shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of said town or city, and under such regulations and upon such terms or

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conditions as said authorities may from time to time prescribe." Laws 1861, pp. 11, 12.

In 1867 the following additional proviso was added to section 34: "Provided, further, that after said consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named pursuant to the terms thereof." Laws 1867, p. 257.

The ordinance of 1879 was passed after the general street-railway act of 1867 was enacted, and the latter contained a provision that it should have application to all street railways organized previous to its passage. It is not contended that any change was made in the general act which would affect the operation of the above language; but section 13 of that act, which covers the same subject, may be quoted: "Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use such streets, and any such company may extend, construct, use and maintain their road in and along the streets and highways of any township, adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company and the terms thereof, shall be recorded by the township clerk in the records of his township."

There has been much discussion at the bar concerning the character of the rights which the city, under the acts, confers upon the railway companies, in giving its consent as therein required. An examination of the briefs does not disclose any real difference between counsel upon this point. The franchise to construct and operate a street railway is conferred by the

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legislature upon any persons who organize as a corporation under the act, and file articles as required. The function of the city, under the act, is merely to consent, upon conditions, that the companies may exercise the state-given franchise in its streets. Similar statutes have been before other courts, and this is the view which has always been taken in respect to the city's function under them.

In *Chicago City Ry. Co. v. People*, 73 Ill. 541, where the construction of a similar statute was under consideration, the Supreme Court of Illinois said: "It is a misconception of the law to suppose that the railroad company derived its power to construct a railroad from any ordinance of the city. All its authority is from the state, and is conferred by its charter. The city has delegated to it the power to say in what manner, and under what conditions, the company may exercise the franchise, conferred by the state, but nothing more." And the same view is taken by the Supreme Court of Michigan in the case of *People v. Mutual Gas-light Co.*, of Detroit, 38 Mich. 154; *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522; *Sims v. Railroad Co.*, 37 Ohio St. 566, 4 Am. & Eng. R. Cas. 132; *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. Rep. 29, 38 Am. & Eng. Cor. Cas. 685.

The first proviso of section 34, requiring the consent of the city, is a limitation upon the franchise to construct and operate, conferred in the granting section, No. 33. The office of a proviso is usually that of limitation. *Minis v. U. S.*, 15 Pet. 423, 445. It here introduces a limitation in two ways: First, by making the franchise operative only on consent of the city; and, second, by allowing the city, in giving its consent, to surround the exercise of the franchise with such further limitations as it may choose to impose. As we have seen, no power exists in the city, outside of the railway acts, to grant a vested easement in the streets. The power to consent, which is indirectly conferred by section 34, necessarily implies the power to grant the easement. But a power implied must be limited to the necessity which gives rise to its implication.

An inevitable limitation thus arising is that the easement shall not endure beyond the life of the franchise for which the easement is given. I cannot escape the conclusion, which seems to me clear to a demonstration, that the power of consent to be exercised by the city under the statute is limited in time to the life of the franchise to be consented to. The acts of the state and city, together, in granting the franchise, and consenting to its exercise, are equivalent to the grant of a franchise by a state legislature, under a constitution which permits it, to a company to lay its railway in certain named

streets of a city, and to operate the same, without the intervention of the city in the matter. Under a franchise of the kind supposed, such easement in the streets would pass to the grantee as would be necessary to the enjoyment of the franchise. Could it be claimed, in such a case, that the easement in the streets would outlast the franchise? Clearly not. Why, then, in this case, where the city's power to confer the easement only arises from the necessity for the enjoyment of the franchise, is it necessary to infer a power to confer an easement beyond the life of the franchise? Of course, there is this difference between the case just supposed and the conditions which may exist under the statutes here,—that the second grantor, i.e., the city, may impose additional conditions upon the exercise of the franchise, not contained in the original grant of the state, and so may cut off or reduce the time for which the franchise may be actually enjoyed to a time less than the life of the corporation; but, so far as relates to the maximum time of the easement, the supposed case clearly represents and illustrates limitations upon the combined acts of the state and city. The construction of the statute above stated does not require us to decide that the legislature could not give the city the power to confer on a street-railway company an easement in the streets beyond the life of its franchise. If the power existed, it would be a power in the city to delegate to one company the city's right to consent to a franchise of a second company, to be created by the state many years thereafter. If such a delegation may be authorized by an act of the legislature, certainly the power to make it cannot be inferred from a mere power to consent to the franchise of the first company.

The suggestion is made that the words of section 13 of the general railway act have a greater significance than section 34 of the tram-railway act, in that the city is therein to consent that the railway company shall construct, maintain, operate, and own its railway, and the argument is that the consent to ownership of the street railway implies that the easement may extend beyond the life of the franchise to construct and operate. I cannot see that the insertion of the word "own" changes in any way the meaning of the section. Consent to construct and operate certainly implies consent to ownership in the company, and the franchise to own a street railway, as such, conferred on the company, does not endure any longer than its franchise to construct and operate it. After the death of the corporation it owns nothing. It is the stockholders who own the assets, not by virtue of any franchise conferred by the state, but because, as individuals, they have that faculty and right.

It remains to inquire what is the life of the franchise conferred by the state upon a street-railway company under the acts of 1861 and 1867. The franchises of a street-railway company are of two kinds: "First, the kind which every corporation—or, to speak more exactly and properly, its corporators—must have,—the franchise to be a corporation, and to act in its business, and for the purposes of its organization, as a natural person could act; and, second, the franchise to discharge a *quasi*-public function for hire, i.e., to construct, maintain, and operate a street railway for the use of the public, and to collect tolls therefor. Franchises of the second class, which, for convenience, we may call non-corporate, are defined to be special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally, as of common right. *Bank v. Earle*, 13 Pet. 519. Such is the privilege to carry on any business in which the public have an interest, and from which the public may have service upon the payment of the usual fare or toll, as the maintenance of a ferry, a turnpike, or a railroad. *People's Passenger R. Co. v. Memphis City R. Co.*, 10 Wall. 38. Franchises of this kind may be conferred on an individual, but, as a proper discharge of the *quasi*-public duties generally requires much capital, it is the custom of the legislatures to confer them, directly, only on corporations. In the absence of an express provision in the charter to the contrary, non-corporate franchises conferred on a corporation last as long as the corporation is chartered to live, and no longer. If I comprehend the argument of counsel for the defendants, while they concede that the franchise to be a corporation cannot endure beyond the charter life, they maintain that when property has been acquired, for the enjoyment of which, a noncorporate franchise is necessary, the franchise becomes property, and is as indestructible and permanent as the property to which it is attached. Much of the argument is based on cases where such franchises and property have been assigned; and the view seems to be that, because the franchises are assignable, their length of life is independent of that of the corporation. The franchise to be a corporation is personal and cannot be assigned, but there is no objection to assigning non-corporate franchises. Property is required to enjoy franchises, and, when the property is assigned, the franchise to enjoy it, which is inseparable from it, goes with it to the assignee. *Gue v. Tidewater Canal Co.*, 24 How. 257; *Memphis & L. R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Railway Co. v. Delamore*, 114 U. S. 501; *Joy v. Plank-road Co.*, 11 Mich. 155; *McKee v. Railway Co.*, 41 Mich. 274. But, while the property and franchises are inseparable, that can only be

while the franchise endures. Though it is assignable, the franchise can only be assigned or enjoyed by the assignee as long as it is in existence. Speaking for the Supreme Court of Pennsylvania in *Railroad Co. v. Casey*, 26 Pa. St. 287, Judge BLACK said: "The right to take tolls on a road is an incorporeal hereditament, which may be granted to a corporation or to an individual, and the grantee has an estate in the franchise. But what an estate? The estate endures forever, if the charter be perpetual; for years, if it be given for a limited time; and at will, if it be repealable at the pleasure of the legislature."

This opinion is cited as authority by Mr. Justice MILLER in his opinion in the case of *Greenwood v. Freight Co.*, 105 U. S. 13, 9 Am. & Eng. R. Cas. 526, where it was held that, under a reservation clause allowing the legislature to repeal any incorporation act at pleasure, the legislature might repeal the charter of a street-railway company, and destroy its franchise to run its railway in the streets of Boston. Speaking of the effect of the repealing act, Justice MILLER said: "If the essence of the grant of the charter be to operate a street railway and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend on the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights."

Again: "The history of the reservation clause in acts of incorporation supports our proposition—that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal." If this be true, *a fortiori*, is the franchise gone at the expiration of the express term for which the charter rights were granted?

It should be said that it is a mooted question whether, when a legislature exercises its right to repeal the charter of a corporation under the usual reservation clause, the repeal

terminates those franchises of the corporation which are not corporate, and which are necessary to the enjoyment of property acquired by the corporation during its lawful existence. The Court of Appeals of New York, in the case of *People v. O'Brien*, 111 N. Y. 1, 36 Am. & Eng. R. Cas. 78, has held that such a repeal does not take away the franchise to maintain and construct a street railway on a street of New York, the perpetual easement for which had been obtained from the city. It seems difficult to reconcile this case with *Greenwood v. Freight Co.*, *supra*, or with *Railroad Co. v. Casey*, *supra*. Upon this point it is probable that the law of Michigan is more in accord with that of New York than with that of the cases just referred to; for in *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, the Supreme Court of Michigan decided that the power to alter, amend, or repeal the charter of a plank-road company did not permit the legislature to pass an act compelling the plank-road company to remove its toll-gate beyond the municipal limits of Detroit, and give up the tolls of 2½ miles of its road, on the ground that the franchise to collect tolls for the use of the road was property, and therefore the act deprived the plank-road company of its property. But such a conclusion as that in *People v. O'Brien*, or that in *Detroit v. Detroit & H. P. R. Co.*, has no bearing on the point we are discussing. It is only, in effect, a holding that the power of repeal reserved does not enable the legislature to reduce or destroy the value of the property of the corporation by arbitrarily taking away from its creditors and stockholders, during the charter term, the right to enjoy it in the way provided in the charter. But property acquired by a corporation is purchased for its enjoyment only during the charter life, and the necessary expiration of the franchise therein conferred is a fact entering into every investment of capital made by it, just as the improvements made by a lessee or life tenant must be made with the termination of his estate in view. The analogy is not quite accurate, because the lessee or life tenant loses his improvements, while the corporation only loses the value giving franchise, but its stockholders retain the rest of its property. Take the case of *Detroit v. Detroit & H. P. R. Co.*, *supra*. The corporation was created for 60 years, with the right to construct a plank-road and take tolls. The act of the legislature, the validity of which was attacked, was passed at the end of 30 years. Certainly, the Supreme Court of Michigan would not have held that when the 60 years of its life had expired the company might sell the road (if it had acquired it in fee) to another, and confer on that other the franchise to collect tolls. Yet this is the result involved in the contention of counsel for

the defendants, that the attaching of franchises to property gives the former as much permanence as the latter.

The point under discussion is expressly decided by the Supreme Court of the United States in the case of *Turnpike Co. v. Illinois*, 96 U. S. 63. In that case a turnpike company was created a body corporate, to continue for 25 years, with power to construct and maintain a certain turnpike, erect the toll-gates, and collect tolls. The state reserved the right to purchase the road at the expiration of the charter by paying the corporation the original cost of construction; but the road, and all its appendages, were to remain in possession of the company, subject to the rights and restrictions contained in the charter, until such time as the state should refund the cost. By a supplemental act passed in 1861, the company was authorized to extend its road, and, in consideration of its keeping in repair a certain bridge and dyke, to use them as part of the road, erect toll-gates thereon, and collect tolls. When the 25 years, the term of the charter, had expired, in 1869, the legislature passed an act granting the city of East St. Louis the exclusive control of the street upon the dyke. The act of 1869 was attacked, as impairing contract obligations. It was held that the franchise to collect tolls on the bridge and dyke, conferred by the supplemental act of 1861, was separate and distinct from that authorizing the collection of them on the original road, with its provision for continuance beyond the corporate life, and that the second franchise did not extend beyond the term of years for which the corporation had been created. Said Mr. Justice BRADLEY: "No term was expressed for the enjoyment of this privilege, and no conditions were imposed for resuming or revoking it on the part of the state. It cannot be presumed that it was intended to be a perpetual grant, for the company itself had but a limited period of existence. At common law, a grant to a natural person without words of inheritance creates only an estate for the life of the grantee, for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. In the present case the turnpike company was created to continue a body corporate only for the term of twenty-five years from the date of its charter; and although, by necessary implication, a further continuance, with the special faculty of holding and using the turnpike authorized by the act until redeemed by the state, is given to it for that purpose, yet it is only by implication, arising from the necessity of the case, and therefore cannot be extended to other

purposes and objects. Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public."

The learned justice then said that if the company had constructed the bridge, and acquired a fee in the dyke or road, the case would have had a different aspect, for then the question would have been whether the state could take the property back without just compensation. These last remarks refer to the fact that the state had resumed possession of the bridge and road. If the turnpike company had built the bridge, and bought the land, and built the road, its property in them would not, of course, be destroyed by the determination of the franchise, and the public could not use them without paying just compensation. The franchise to collect tolls on them, however, would not have continued, and there is nothing in the language of the court which would justify such an inference.

It may therefore be assumed, with entire confidence, that when the state of Michigan granted, by virtue of its laws, to the Detroit City Railway Company, the franchise to construct and operate a street railway, it was limited to the life of the company, no matter to whom the franchise might be thereafter assigned, or to what property it might become attached. It necessarily follows that the power of the city to consent to the exercise of the franchise conferred upon the railway company was also limited in its duration to the life of the corporation. Either the limitation stated exists, or the power of the city is unlimited, and it may create in the streets, by virtue of the power to grant an easement, implied from these statutes, an estate in perpetuity. No other limitation can be found in the act than the life of the company to whom the consent is to be given. It is suggested that the present grant, the validity of which is contested, was only 30 years, and as the city, unquestionably, had the right to confer a grant of that duration on one company, it might upon another. This ignores altogether the logical ground upon which the limitation must be implied. The 30 years mentioned in the statute can have no effect to limit the duration of the consent or easement which the city confers, except by reason of the fact that this is the time beyond which the life of the franchise and the corporation cannot extend. This shows that the real limitation is not the 30 years, but it is the life of the corporation. It is suggested that there is some time between the life of the corporation and a perpetual grant, to be defined by the courts as a reasonable time within which the grant can endure. I do not know any mode by which such a limit can be fixed. In many of the states, grants made are perpetual, and this where

there are no words of perpetuity, but merely words without limitation. In view of the fact which appears in *Booth on Railways* (section 17), that, in some 10 or 12 states, grants of this kind have been made and sustained, which are perpetual, it cannot be said that a perpetual grant would be so unreasonable that the court might hold it void, if the statute cannot be construed definitely to fix the duration of a grant less than one in perpetuity. The attempt of the Supreme Court of Iowa to determine what would be reasonable time for the duration of an exclusive grant in the streets to a street railway, in *Des Moines St. Ry. Co. v. De Moines B. G. St. Ry. Co.*, 73 Iowa, 513, 32 Am. & Eng. R. Cas. 209, did not meet the approval of Justice JACKSON in *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. Rep. 659. See, also, Mr. Justice BROWN's opinion in *Saginaw Gas-light Co. v. Saginaw*, 28 Fed. Rep. 529, 16 Am. & Eng. Corp. Cas. 562, and *Richmond Gas-light Co. v. Middleton*, 59 N. Y. 228. As between a construction which will place a limitation on the grant, and one which will give rise to a perpetuity, it is clear that it is the duty of the court, in favor of the public, to impose the limitation. It is true that what we are considering here is the power to make the grant, and not the grant itself. But the same rule applies in the construction of statutes conferring powers upon municipal corporations to make such grants as in the construction of the grants themselves. But even suppose that, where there was no limitation, the courts might fix a reasonable limitation. Why is it necessary for them to do so where there is a plainly implied limitation in this statute? Certainly, if that limitation is not unreasonable, why seek another? It does not appear that it is unreasonable.

Reference is made to show the necessity for a longer grant than the life of the corporation, to those sections of the street railway acts which give the company power, with the consent of the city, to build new routes, and to extend its old lines. It is said that it would seriously interfere with the probability that such new routes would be built in the latter years of the corporation's life if the estate of the railway company in the streets were limited to its life. It does not seem to me that this result should prevent what seems to be reasonable construction of statute. An express provision of law that the city council might confer an easement in the streets for 30 years, but that such easement should not be extended during its continuance, would hardly seem unreasonable. If one railway company will not build new routes and make extensions, the city would be able generally to secure the building of the new routes by grants to new corporations, and perhaps

even to accomplish the same thing with reference to extensions. Neither the law nor public policy requires that one railway company shall furnish all the railway facilities in the city to the public. Nor does the provision for mortgaging the franchises and property of the company, with power in the purchasing company to use the property and exercise the franchises as the old company would have done, indicate a purpose on the part of the legislature to lengthen the time within which easements in the streets can be granted. The new company is to exercise exactly the same rights in the streets that the old company did under the statute and no more.

It by no means follows that, because under its general corporate powers the street-railway company might have the authority to receive an estate in the streets beyond its own life, the city has the power to confer such an estate. The usefulness of such a franchise to the company need not be denied. Its right to hold it need not be inquired into. The guide which the court must follow in construing the powers of the city is the interest of the public, and not the company, and only in so far as it is necessary to the exercise of the franchise can the power of the city be inferred to grant the easement. The cases which have been referred to as establishing the principle that the life of the corporation cannot interfere with its receiving an estate to endure thereafter have no application to the case at bar. The power of the city, or the owner of the estate to be granted, to convey, was in none of the cases the question. Thus, in the case of *State v. Laclede Gas-light Co.*, 102 Mo. 472, 34 Am. & Eng. Corp. Cas. 49, the question was whether a city ordinance granting to the Laclede Gas-light Company, its successors and assigns, the privilege of furnishing gas to the city and private consumers for a named period, was void because the term extended beyond the period of the existence of the company's charter. The ordinance provided that it might transfer all its rights, privileges, and franchises to any organized gas company of the state, which would, within 20 days after the transfer, file its written acceptance of the ordinance, and give bond to perform all the agreements required of the original company. The power of the city to make the contract was conferred in the charter to the St. Louis Gas Company by section 13 of the act of February 11, 1839, and is stated in *City of St. Louis v. St. Louis Gas-light Co.*, 70 Mo. 98. The provision was that the corporation of the City of St. Louis and the directors of the St. Louis Gas Company might contract for, and make regulations relating to, the lighting of the city with gas, in such manner as should be agreed upon, and they might make

such contracts relating to the lighting of the city as might be beneficial to them and the public, and in the case last cited the court say: "This section is broad and comprehensive in its terms, and authorized both plaintiff's and defendant's board of directors to contract with reference to the business of the company without limitation, they being left to the determination of the question whether such contract would be beneficial to themselves and the public."

There was no question of the power of the city in *People v. O'Brien*, 111 N. Y. 1, 36 Am. & Eng. R. Cas. 78. Reference is also made to *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192, where the question was one of taxation. It appears in the recital of facts, as reported by the supreme court, that defendant below had acquired all the real and personal property, right of way, and franchise for the privilege of running street cars, from another street-railway company, whose charter had expired; and it is said that this appeared to be no objection to the Supreme Court of the United States, and did not call for comment. In the report of the same case in 40 La. Ann. 587, this fact does not appear in the statement, and it is obvious, therefore, that no question was raised in either court on the point. Nor is it surprising, in view of the holding in *Brown v. Duplessis*, 14 La. Ann. 842, that the city, under its general power of regulating the use of the streets, might sell an easement in them for a railway, to an individual, for 20 years, without his having secured a state franchise. The case shows that in Louisiana the city can grant the franchise without the state's acting at all; so that, of course, there is no necessary connection between the life of the corporation created by the state, and a franchise which the city has a right to confer on an individual without limitation. This fully explains the rulings of the United States Supreme Court in *New Orleans City & L. R. Co. v. New Orleans*, *supra*, and *Railroad Co. v. Delamore*, 114 U. S. 501, if indeed, they involve the point claimed by defendants' counsel, which is by no means clear, because there is no discussion or consideration of it in either case.

Another argument made against limiting the city's power of consent to the life of the corporation is the practice which is said to have prevailed all over Michigan, of making grants in the streets beyond the life of the corporation grantee. Sixteen instances have been submitted. This is not a large number, considering the number of such corporations of the kind in question which there must be in the state. Of the grants submitted, half were made in 1890, or since, and the rest were scattered along between 1880 and 1890. While the practical construction of a doubtful statute, by those who

are required to construe it in order to execute it, is often persuasive with the courts, such construction, to be controlling, must have been uniform, long continued, and generally acquiesced in. Neither requirement is complied with here. Some councils seem to have thought that the legal limit on grants was 30 years, and some have made grants perpetual. The great weakness of the argument on this ground, however, is in the fact that in no instance submitted has the first grant expired. Until such expiration the question of the validity of the extension would not be raised, and there could hardly be said to be acquiescence therein by the public, or others interested to question it.

It is insisted that the necessary result of this limitation upon the right of the city to consent to the construction and maintenance of a street railway is that the easement conveyed by the city would end upon the premature dissolution of the corporation under the repealing clause, or by judicial forfeiture, as well as upon its death by normal expiration of the charter term. Even if this result does follow, it is not the *reductio ad absurdum*. Whether this is the result or not depends on the effect to be given to the repealing clause, or the judicial forfeiture. If either can take away the property-rights in a franchise, then the question would still remain, whether the easement of the railway company might not endure for the normal life of the franchise, inasmuch as it was not granted by the state, but by the city, for that normal life. Whatever the conclusion upon this point, it would not, in any way, as it seems to me, show that the power of the city is not to be limited by the normal life of the franchise and the corporation. Under the decision in *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, it is probable that premature dissolution would not prematurely destroy the non-corporate franchises, when attached to the easement conferred by the city, and that they might both endure until the normal expiration of the franchise.

Another argument against the conclusion arrived at, as to the city's power, is the supposed anomaly that the grant of 1879 to the City Railway Company for an extension of its easement in the streets beyond its life should be invalid, when, if the stockholders of the City Railroad Company had caused a transfer of its property and franchises to a new company, and then had procured the grant of 1879 to the new company, its validity would have been beyond dispute. The anomaly, if there be one, arises from the law which courts are not permitted to ignore, that one corporation is a different entity from another, and from the limitation upon the lives of corporations, which seems to be the peculiar policy of the state of Michigan.

Section 10, art. 15, of the state constitution provides that no corporation, except for municipal purposes, or for the construction of railroads, plank-roads, and canals, shall be created for a longer period than 30 years. It has been the subject of some argument at the bar as to whether street railways come within the inhibition, or within its exception. I am inclined to think, considering the fact that street railways were not known at the time the constitution was adopted, that they are not properly included within the exception, and that they are within the inhibition of the constitutional provision. This view is borne out by the construction which the legislature has put upon this section in its provision for the corporate life of street railways. The street railways, as has already been stated, were organized first under the tram-railway act, which provided for locomotion by horse-power only, and they were limited in life to 30 years. Railroads, however,—that is, commercial railroads,—plank-road corporations, and canals have not been limited in duration by the legislature. Street-railway corporations, organized under both the tram railway act and the general railway law, have always been limited to 30 years. This would seem to be a construction by the legislature of this section, and a recognition that the street railway was not properly a railroad, within the view of the framers of the constitution. But it is really immaterial, for the discussion here, whether it is or not. The life of street-railway companies is limited by the incorporating act to 30 years, and it is to be inferred that the reason for the limitation is the same as that which induced the constitutional convention, and the people who adopted its work, to impose a limitation on corporate life in the constitution. Now, the reason for this constitutional limitation has been explained by the Supreme Court of Michigan in the case of *Agricultural Soc. v. Houseman*, 81 Mich. 610, 32 Am. & Eng. R. Cas. 550, where the court said: "The evident intent of this section was to prevent the perpetuation of corporate power and corporate life, so as to place it practically beyond the reach of the people or the legislature. It was intended to apply to corporations of a private character, organized for profit and the accumulation of wealth, and not to those which are public in their character, and designed solely for the purposes of education and improvement."

In the case of *Mason v. Perkins*, 73 Mich. 303, where the question was as to the validity of an act of the legislature of Michigan authorizing mining and manufacturing companies to renew their corporate existence for 30 years, the court, in an opinion denying the power of the legislature to pass such an act, said: "Is not such a mandate a direct and positive limitation on the power of the legislature to extend the time, or

renew the corporate existence, beyond that term? What consequences are expected to follow upon the expiration of such limitation? Naturally, the corporation becomes dissolved, and incapable longer of exercising corporate functions in pursuing and carrying on its business. Its business is to be closed out, its obligation paid, and the assets distributed among its stockholders. * * * The design of the framers of the constitution was to put all purely private corporations on the same footing, and to fix a limit of time, beyond which they should not continue to exist."

It is sufficiently apparent from this, and from the constitutional limitation itself, that the limitation upon the corporate life was not a mere formality, but it was intended to interfere with the perpetuation of corporate wealth and power. In the light of this state policy, it would hardly be proper for a court to be swayed from a conclusion as to the meaning of a statute by the claim that it involves an anomaly, when the anomaly has no existence, except in the view that a corporation may in fact perpetuate its wealth and franchises, and remain identically the same entity, no matter how many different names it bears, or how many formal conveyances of property and franchises are necessary to continue its existence. I am of opinion, for the reasons given, that it was not within the power of the common council of Detroit, on November 14, 1879, to confer upon the Detroit City Railway, the right to occupy the streets, with a railway 16 years beyond its corporate life.

The discussion, thus far, has related to those grants in the streets which were made by the city to the Detroit City Railway. All of them must be held to expire on the 9th of May, 1893. But the grants to the Detroit & Grand Trunk Junction Railway Company, and to the Central Market, Cass Avenue & Third Street Railway Company, even if the ordinance of 1879 had not been passed, would not have expired until 1903 and 1905, respectively. When the ordinance of 1879 was passed, those grants were owned by the Congress & Baker Street Railway Company and the Cass Avenue Street Railway Company, whose charters did not expire until 1905 and 1907, respectively. The extension of 1879, with respect to these grants, would be valid until those dates, if the owners chose to rely on the ordinance as binding on the city *pro tanto*. Whether, therefore, the ordinance of 1879 is to be wholly annulled, or to be given effect as far as may be, the grants referred to do not terminate May 9, 1893. It cannot affect this result that the franchise and easement lawfully enduring until 1905 and 1907 were, after they came into existence, held for a time by the Detroit City Railway Company.

Whether that company had the power to take such property, and enjoy it, or not, its actual ownership and enjoyment of it could not forfeit and destroy the existence and continuance of the inseparable easement and franchise during the life of the first grantee of the franchise. The Detroit Citizens' Street Railway Company is in possession of these easements and franchises, and we are not here to determine the legality of the mode by which it acquired title, in the absence of the original grantees of those easements and franchises, who, so far as appears, fully acquiesce in its ownership of them. I say this much to show that we do not need now to consider, and do not decide, the question whether the Detroit City Railway had the statutory capacity to receive from another company that company's franchise and easement, enduring beyond the life of the Detroit City Railway. With respect to the Congress & Baker Street grant and the Cass Avenue grant, the relief prayed for by the complainant must be denied.

I have reached the conclusion above stated as to the meaning of the street railway laws of Michigan only after giving this case the study and investigation which the large amount involved in the issue, and my want of familiarity with the Michigan law, have necessarily required. The fact that my brother Swan, with his legal acumen, long training, and intimate knowledge of the Michigan law, differs with me, gives me much concern, lest I have reached a wrong result. Nevertheless I cannot reconcile any other result to the rules of construction which it seems to me must govern in the case; and it is my duty, therefore, to adhere to the position as stated.

2. It is contended on behalf of the defendants that, even if the ordinance of 1879 is invalid, a court of equity will not assist the city, by affirmative relief, to avoid or annul it, or to restore the streets to its possession, which it parted with in performance of the invalid contract. In *St. Louis R. Co. v. Terra Haute R. Co.*, 145 U. S. 393, the supreme court decided that when a corporation appeals to a court of equity to rescind a contract which is *ultra vires*, and to be restored to rights parted with under it, the court should refuse to grant any relief, because both parties to the contract made in violation of law are in *pari delicto*, and should be left where the court finds them. The cases cited, and others like it, do not, however, apply to the case at bar. The defendant is now occupying the streets of Detroit. It has no right to be there, except by a lawful grant of the city. The city council, in its legislative capacity, passed the ordinance of March 29, 1892,

Equity relief
to city from
consequence of
invalid ordi-
nance.

fixing the time beyond which the company could not remain in the streets. The question here is whether the ordinance of 1892 is valid, as an exercise of the council's legislative power over the streets. We have found that the ordinance purporting to make a grant beyond May 9, 1893, was invalid. It was therefore within the power of the city council to pass the ordinance of March 29, 1892, and by virtue of its terms the company will unlawfully occupy the streets after May 9, 1893. The city does not need to have the ordinance of 1879 rescinded by a court of equity. The city has already rescinded it by the ordinance of 1892. The continuance of the street-railway tracks in the streets, without the authority of the city, will become a public nuisance, which the city may ask a court of equity to remove by the power of injunction. *Bay Co. v. Bradley*, 39 Mich. 163. The case of the city is different from that of a private corporation. The city council, for the time being, is the trustee, in control of the streets for the benefit of the public; and, although former trustees may have attempted to do that which they had no power to do, the public cannot be prevented from having asserted in its favor the ordinary equitable remedies to maintain its rights in the streets.

3. The answers plead that the city is estopped in this case to maintain that the extension clauses of the ordinance of 1879 are invalid, because in a previous litigation between the

Estoppel of
city to deny
validity of
extension.

city and the Detroit City Railway Company the validity of the ordinance in question was involved and a judgment was rendered against the city on that issue by the supreme court of the state of Michigan. The litigation referred to was an attempt by the city to collect taxes from the Detroit City Railway Company beyond the limits fixed in the ordinance of 1879 and the ordinance of 1887. The street-railway company relied on the contract provisions of the ordinance with reference to the amount of taxes which the city should collect, and the city contended that those clauses did not, and could not, limit its right to impose taxes under the laws of the state. The supreme court held that it was within the power of the city to stipulate what taxes the street railway should pay for the enjoyment of its easement in the streets, and to bind itself as by a contract. The validity of that clause in the ordinance of 1879, which extended the privileges and obligations of the ordinance of 1862 beyond May 9, 1893, was not, however, involved in the case. As against the city, the ordinance would be binding until May 9, 1893, and it would not lie in its mouth to say that the taxation clauses were invalidated because it had not the power to do all it stipulated to do with

reference to the extension of the easement beyond 1893. Had the city been seeking to enforce some of the stipulations contained in the ordinance against the railway company, it would doubtless have been a good defence for the company to have set up the invalidity of the extension beyond May 9, 1893, but such invalidity, if waived, or not questioned, by the company, would furnish no ground for the city to disregard its other obligations under the contract. It was not necessary, therefore, for the supreme court, in deciding the case referred to, of *City of Detroit v. Detroit City Ry. Co.*, 76 Mich. 421, 39 Am. & Eng. R. Cas. 538, to pass upon, or consider, the validity of that clause of the ordinance of 1879 which is here in question; and its judgment in that case cannot, by any possibility, be *res adjudicata* here. *Jacobson v. Miller*, 41 Mich. 90; *Cromwell v. County of Sac*, 94 U. S. 351.

4. We come now to a defence which certainly appeals to a chancellor. The answer sets out with much particularity the extensions and the expenditures which the Detroit City Railway made upon the faith that the grant of the easement in the streets beyond its corporate life, until 1909, was valid. It appears from a comparison of the ordinance of 1862 with that of 1879 that the Detroit City Railway assumed much heavier obligations under the new ordinance than it had under the old, with respect to paving between tracks and paying taxes. Until within the last two years, no one, on the part of the city, has questioned the validity of the extension which we have found to be invalid. Large sums of money have been expended on the faith of it. Obligations have been enforced by the city against the street-railway company, which derived their binding character only from the ordinance of 1879. Were the city an individual, its conduct, in now seeking to escape, for want of power, its obligations solemnly entered into, and for more than a decade quietly acquiesced in, might justly be said to be wanting in good faith. Were the case one in which money had been given to the city, or where work had been done upon property which the city held, it might be possible for the court to give the defendant company relief, by requiring the city to disgorge that which it had illegally taken, by giving a money judgment against it, for money and property had and received. *Hitchcock v. Galveston*, 96 U. S. 341. But it is impossible, in this case, to apply such a remedy. The investments of the street-railway company were not given to the city. They were investments of private funds in private property, for private purposes, to subserve the public interest, on the faith of the supposed permanence of the investment. Those who made the investment knew, or ought to have

Estoppel on
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known, the statutory powers under which the city council acted, and if I am right in the conclusions already stated with reference to those powers, ought, in the necessary theory of the law, to have known that they were investing on the faith of a grant which would last only to May 9, 1893. Where full knowledge of the powers of a corporation are had by the person dealing with it, he cannot plead estoppel by reason of a mistake of law, to avoid the claim of *ultra vires*. This is especially true in cases where the corporation is a municipal corporation, and is exercising powers in trust for the public. *Rens v. City of Grand Rapids*, 73 Mich. 237, 247, 28 Am. & Eng. Corp. Cas. 364; *Bogart v. Lamotte Tp.*, 79 Mich. 294; *Spitzer v. Village of Blanchard*, 82 Mich. 234. I am of the opinion, therefore, that the plea of estoppel is no defence in favor of the Detroit City Railway, upon whom, as we have found, the city council had no power to confer the grant to occupy the streets beyond May 9, 1893.

In the consideration, the plea of estoppel, however, a different question from the one just considered is presented by the transfer, in December, 1890, of all the property and franchises of the Detroit City Railway Company to the Detroit Street Railway Company, and later by the Detroit Street Railway Company to the Detroit Citizens' Street Railway Company. The two latter companies had lives and franchises from the state, enduring until 1920, and there was no want of power in the city or city council to make a grant to either of them until 1909, like that now claimed by them under the ordinance of 1879. If the city, after these companies have had possession of the streets, has recognized the ordinance of 1879 as valid, by enforcing obligations against them under it, which could not be enforced under the ordinance of 1862, and which these companies discharged on the faith of the 1909 extension, and in doing so expended much money, the question presented is whether the city is not estopped, as against them, to deny that it has confirmed *in pais* the void grant to the Detroit City Railway Company, and made it a valid grant directly to them. The averments of the answer upon this point are as follows:

"That, under the provisions of the various ordinances and grants heretofore referred to, the several street railways to which such grants were made were required to, and did, pave, repave, and repair, and keep clean, portions of the streets between and adjacent to their tracks, and in so doing expended large sums of money for permanent improvements on the streets so occupied by them. That, during the years 1890 and 1891, some of said companies, their successors and assigns, were required to alter the grading of the streets, and to relay, at great expense and labor, many miles of the track, and since

January 3, 1889, have constructed many miles of track on new lines, and extensions of old ones, all of which they did with the full knowledge and understanding of the City of Detroit, and solely by reason of its admission and agreement that the rights, privileges, extensions of time, contained and made in and by the ordinance aforesaid, adopted November 14, 1879, were valid and binding and enforceable on said city, as well as on said company. That in the year 1890 the said city of Detroit repaved Jefferson avenue from Mt. Elliott avenue to Woodward avenue, and the said Detroit City Railway Company was thereby required to, and did, rebuild its entire track on said Jefferson avenue, and change the grade thereof, and did pave between its tracks, making a permanent improvement, which would last for many years. That during the year 1891 many other extensive permanent improvements were made by said Detroit City Railway Company, its successors and assigns, involving the outlay of large sums of money, solely by reason of the understanding between the said city and the said company, and of the admission and agreement of said city of Detroit that the rights of said company, their successors and assigns, under the ordinance of November 14, 1879, extended until November 14, 1909. And this defendant avers that the said city of Detroit, by reason of the matters herein set forth, is estopped from claiming that said ordinance of November 14, 1879, is invalid, and from taking any advantage of the invalidity of said ordinance, should this court, for any reason, in any proceeding before it, hold the same to be void and ineffectual."

My impression is that upon the foregoing averments, though they are not very clear in distinguishing between the acts of the new and of the old company, the question suggested above is presented. The decision of the question is by no means free from difficulty. Because of the then more important questions, it was not argued at the bar. As it has, in my view of the other questions, assumed an importance, in deciding the case, not before given to it by counsel, I do not think it should be disposed of without full argument. More than this, the magnitude of the interest of both parties to this cause is such that all doubt or ambiguity in regard to the exact facts upon the point should be removed by amendment. The facts can hardly be the subject of much dispute between the parties, because many or all of them must be capable of record proof, and it is hoped the parties can agree upon them. The order of the court, therefore, will be for a further argument of the point stated, with leave to the defendants, within 10 days from the filing of this opinion, to amend their answers to more distinctly disclose the facts upon the point. If com-

plaintant cannot accept defendants' statement of facts in the amendment, a replication may be filed and evidence taken, as in other cases.

SWAN, District Judge (*dissenting*).—The opinion of the circuit judge, in my judgment, in its reasoning and conclusions, is so utterly subversive of the principles of equity that I am unwilling, by my silence, to sanction an apparent assent to what seems to me to be a most inequitable result. The bill sets forth, in substance, the original street-railway ordinance of November 24, 1862, the incorporation of the Detroit City Railway Company for 30 years under the tram-railway act, the passage of the ordinance of November 14, 1879; and reciting that the railroad company insists on the right, under that ordinance, to operate its railways until 1909, as the basis of the interference of a court of equity, it then alleges that: "Said ordinance of November 14, 1879, so far as it purports to extend the rights of the Detroit City Railway, and enlarge the powers and privileges theretofore conferred upon it by said common council beyond the 9th of May, 1893, was wholly invalid, and not within the power or authority of the common council of said city to grant or confer upon said railway company, and that the legislature has never given the power to said common council to grant such privileges to said company, extending beyond its corporate life, and that the constitution prohibits granting such a privilege."

The only equity it pleads is contained in its eighteenth and nineteenth paragraphs: "(18) The right or privilege of maintaining and operating street railways on the streets above mentioned, on which said City Railway Company constructed its lines of railway, is of great value; and if your orator was now free to enter into a contract with a company or companies, whereby it might grant such right or privilege to such company or companies, unembarrassed by claims or threats of the said defendants, and especially of said Detroit Citizens' Street Railway, your orator might dispose of said right or privilege for a large sum of money, amounting at least to the sum of \$1,000,000. (19) * * * The common council of said city desired to negotiate for, and if possible to enter into, agreements with a company or companies who may construct and operate street railways on said streets, but your orator cannot, by reason of said claims and threats of said defendants, successfully negotiate or enter into contracts on favorable terms with any company or companies until the rights of your orator and the defendants hereto are determined, with respect to the time when the privileges granted to the Detroit City Railway expire."

The relief prayed is—"That all rights and privileges under an ordinance of said city passed November 24, 1862, granting to the Detroit Street Railway the right to construct, maintain, and operate lines of street railway in any of the streets of the city, or under the ordinance amendatory thereof, or supplementary thereto, terminate on the 9th day of May, 1893, and that the right of the city to the control of the streets, and to the granting by it of all rights and privileges of constructing and operating street railways thereon, may be determined, and that the defendants, or any of them, maintaining or operating street railways in said streets, be compelled by mandatory injunction or decree, to vacate the same, and remove their tracks, immediately after said date, and be perpetually enjoined from maintaining or operating said railways on said streets after said date, except by permission of complainant, and for other and further relief."

There is no offer in the bill to reimburse or compensate the street-railway companies, or either of them, in whole or part, for the expenditures made by them, or to return the moneys, or any part of the moneys, exacted by the city from the companies by way of taxes in excess of the license-fees to which, under the ordinance of 1862, the city was limited; nor is it denied that these expenditures were made, and taxes exacted, in consideration of, and reliance upon, the validity of the ordinance of 1879, and the good faith of the city. Neither is it contended that the street-railway companies, or either of them, have in any particular violated the terms upon which the said city granted the use of the streets for the operation of their railways, or that in the use and enjoyment of which grant the public easement or travel is in any way obstructed or impaired; nor that they have failed in any circumstance or decree to meet the needs, or even the demands, of the public for cheap and rapid transportation. Neither is there any pretence that the complainant was inveigled into granting this easement by fraud, or that the consideration for which it was granted was inadequate. The entire claim and theory of the bill is rested on the propositions (1) that the city had no power to grant an easement extending beyond the life of the corporation, and therefore the ordinance of November 14, 1879, is void; and (2) that a court of equity has jurisdiction to rescind the grant, decree the right of the grantee terminated, remove the tracks of the defendant from its streets, to the end that the city may make a new and better bargain for their use.

It is conceded that, if the grant in question had been made to a corporation composed of the same individuals, its validity would be unimpeachable in law, as well as in equity.

Accepting, as we must, the truth of all the facts pleaded in

the answer, the cause having been heard on bill and answer, there can be no doubt that, had the complainant's bill set forth these facts, a demurrer to the bill for want of equity would have raised every question material to the decision of the case. In my view of the admitted facts, therefore, the court is not, in the first instance, concerned with the construction to be given to the powers of the municipality, nor to inquire whether or not it has, in this case, exceeded the strict legal limits of those powers. In what I have to say, I accept as undeniable the statement of the law as to the powers of such corporations as laid down by Dillon on Municipal Corporations (section 89), and approved by Judge GRANT in *Taylor v. Railway Co.*, 80 Mich. 82, 43 Am. & Eng. R. Cas. 335, that: "Municipal corporations derive their sole sources of power from legislative enactment. The rule has been long and unquestionably established that municipal corporations are limited to those powers which are granted—First, in express words; second, necessarily incident to the powers expressly granted; third, those which are essential and indispensable to the declared objects and purposes of the corporation."

I accept, also, the rule of construction of legislative grants to corporations, public and private, enunciated in *Minturn v. Larue*, 23 How. 436, "That only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

Whether or not the city, under this rule of construction of its charter and the statute of 1855, under which it acted, proceeded *ultra vires*, to such an extent as to make its ordinance a mere usurpation of power, is a subordinate question, upon which, I am frank to say, I entirely dissent from the opinion of the circuit judge.

The first and main question is: (1) Does the case made entitle the complainant to the relief prayed in the bill? And the second question, of almost equal importance, is: (2) Conceding that the city exceeded its powers in granting to the railway company an easement in its streets for 30 years from November 14, 1879, will a court of equity aid complainant, upon the facts evidenced by the bill and answer?

Does the case made entitle complainant to the relief prayed in the bill?

1. This is nominally a suit for equitable relief, and the effect of the mandatory injunction asked, if granted, will be to practically forfeit and sequester, under the forms of law, and in disregard of deliberate and repeated assurances and con-

tracts of the complainant, under which it and the defendants have acted, the property-rights and privileges, of immense value, owned by the principal defendants, and also the valuable dependent property and securities of their mortgages, all of which were confessedly acquired in good faith, and for valuable considerations, and which the complainant still holds, without tendering compensation to the railway companies for their expenditures and investments, amounting to millions of dollars, or offering to return any part of the consideration received by it in taxes and otherwise, aggregating nearly \$100,000 more, under the very ordinance, and only by virtue of that ordinance, which it now asks the court of equity to declare null and void—an ordinance under which the complainant has acted for 14 years, and expressly authorized, and in some cases even required, investments, and exacted the taxes thereon. Assuming that the city had transgressed its powers in making the grant in question and that a court of law, were this case within its cognizance, would be compelled to so adjudge, under the rigid rules which control its decisions, is it possible, under the admitted facts of this case, that a court of equity will shut its eyes to the iniquity of the demands of the complainant? The question should carry its own answer. It is a familiar maxim of equity jurisprudence that "nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence." Another maxim is that "he who seeks equity must do, or offer to do, equity." The relief prayed calls for the exercise of one of the highest powers of a court of equity, aptly termed in *Irwin v. Dixon*, 9 How. 33, "the extraordinary or transcendent power of injunction, and is therefore to be used sparingly, and only in a clear and plain case," and of which it is well said in *Bonaparte v. Railroad*, Baldw. 217, 218:

"There is no power, the exercise of which is more delicate, requires greater caution, deliberation, and sound discretion, or more dangerous, in a doubtful case. * * * It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, when courts of law cannot confer an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective, preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress; it being the act of a court, not of a party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be

destroyed, irreparably injured, or great and lasting injury about to be done, by an illegal act."

Whether this bill is to be regarded as one for the cancellation of the contract of November, 14, 1879, and a bill *quia timet*, or as invoking equitable interference against a nuisance, the principles mentioned, reinforced, as is their application, by the avowed objects of the bill, its utter lack of allegation or averment of any fact, matter, or thing necessitating equitable interference, and the conceded facts, in the face of which we are asked to interfere, are fatal to the maintenance of this suit. If it can be taken as a bill for the cancellation of the contract made by the ordinance of November 14, 1879, it is a call for the exercise of the highest chancery power—a power most frequently exerted in cases of fraud, accident, or mistake, which ought never to be exercised except in a clear case. *Atlantic Delaine Co. v. James*, 94 U. S. 214; *Marble Co. v. Ripley*, 10 Wall. 354. In the last case a corporation had bought lands charged by a covenant inseparable from the deed by which the land was originally conveyed, and which was part of the consideration of a contract made with the vendor. The company, retaining the deed, sought to have the contract rescinded and cancelled on the ground that one Ripley, through whom they derived title, had not performed the duties which the contract imposed on him; that though it was, when made, intended to operate for the equal benefit of both parties, it had become, in the progress of time, oppressive and burdensome to complainants, or, as they denominated it, unconscionable; that it made them partners with the original grantor and his successors, whether they will or not, and that, if corporations cannot enter into partnership, they cannot purchase lands subject to the obligation of the coming partners, and therefore the contract restrained the alienability of the property. The court said, *inter alia*:

"The agreement is inseparable from the deed for the land. They were made at the same time, and they are parts of one arrangement. What is asked, therefore, is not to rescind the entire contract, but to strike out a part which has become onerous to one of the parties. It is clear that the rights secured to Ripley by the agreement were a part of the consideration for his grant in the land, and so it was understood at the time his deed was made. But the deed was an executed contract; it conveyed the title to the grantee; and if, therefore, the agreement is rescinded by decree of the court, the consideration is taken from the vendor after his conveyance has taken effect, and yet his grant is in force. It is believed that such action by a court of equity is quite unprecedented. It has been ruled that, when a party seeking to set aside a

conveyance made by him has received part of the consideration, he must return it before a court of equity will cancel the conveyance. * * * Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now,—that is, be unconscionable,—that might possibly be a reason why a court should refuse to decree its specific performance, but it has nothing to do with the question whether it shall be ordered to be cancelled. It is not the province of a court of equity to undo a bargain because it is hard."

See, also, *Putnam v. Grand Rapids*, 58 Mich. 419, which expressly applies this doctrine to the contracts of municipal corporations.

The avowed object of this bill—its only purpose—is to obtain the aid of a court of equity to repudiate the complainant's contract on the ground that, if freed from it, complainant might dispose of such right or privilege for a large sum of money, amounting at least to the sum of \$1,000,000. If a more absurd and unconscionable pretence for invoking its plenary jurisdiction was ever presented to a court of equity, the case has not been cited. There is neither pretence nor allegation that the contract, when entered into, was unreasonably hard or unfair, or that either party so regarded it, or even now avers it has that character; but the right to this extraordinary relief is based wholly upon the proposition, not that the contract was prohibited by law, but that the authority to make it had not been expressly granted by the legislature. If it be true, as the bill alleges, that this grant was "wholly invalid," where is the equitable jurisdiction of this court? In *Oakland v. Carpentier*, 21 Cal. 642, the city of Oakland filed a bill to set aside and cancel a grant made by ordinance of the city to Carpentier, of the exclusive right and privilege, for 37 years, of constructing wharves, piers, and docks at any point within the corporate limits of the town, with the right of collecting wharfage at such rates as he might deem reasonable. The grant was made in 1852. The suit was brought in 1854 to cancel the grant, and enforce a surrender of the interests and property transferred, or claimed to be transferred, thereby to Carpentier. The grounds alleged for the interposition of equity were that the grant or conveyance was obtained by fraud on the part of Carpentier, and was made without authority on the part of the trustees in whom the municipal powers of the city were vested, and that it constituted a cloud upon the title of the city, and embarrassed her in the exercise of her legitimate functions. The charges of fraud the court found wholly unsustained by the proofs,

and thus disposed of the remaining allegations of the bill on which the city sought relief, in an opinion by Chief Justice FIELD, now associate justice of the Supreme Court of the United States:

"Stripped of the charges of fraud, the whole claim for equitable relief falls to the ground. The grant was either valid or void or voidable, or if, as contended by counsel for respondents, there can be no occasion for the interference of a court of equity if void, the condition of things—of the rights, privileges, and the estate of the city—remains as though no transfer had been attempted. No cloud is cast upon her title, and no embarrassment can attend the exercise of her legitimate functions. She has only to proceed and assert her privileges and claim her interest, and whoever interferes with them will be a trespasser. If, however, the grant is only voidable, and not void, the plaintiff, seeking aid of a court of equity, can only obtain equity by doing equity; that is, she can only obtain relief from the acts of the agents of the town by tendering compensation to the defendant, who relied upon them for his expenditures. If they [the ordinances of the board of trustees] are only voidable, that interference of a court of equity cannot be invoked until equity is done by the party claiming it; that is, by placing, or offering to place, the party relying upon the acts of the agents of the town in the same position which he would have occupied but for this reliance upon their validity."

A rehearing was asked in this cause, but denied in an opinion by Chief Justice COPE, who had succeeded Chief Justice FIELD on the latter's accession to the Supreme Court of the United States. The necessity of doing equity, as an indispensable condition to the granting of equitable relief, was stated with equal positiveness in the case of *New Orleans v. Steamship Co.*, 20 Wall. 387, the general features of which are not unlike those of the case at bar, although it is not discolored by the stain of bad faith which marks the latter. The facts in the case were that in 1865, during the military occupancy of New Orleans by the Union forces, the mayor, the board of finance, and the board of street-landings, appointed by the commanding general of the department, pursuant to a resolution passed by said boards, executed, by the command of the mayor, to the steamship company, a lease of certain water-front property owned by the city, with the right to inclose and occupy for their exclusive use the demised premises for a term of 10 years, and to build thereon wharves, bulkheads, buildings, and other improvements, for which the lessee was to pay an annual rent of \$8000 in monthly instalments, and for which it gave its promissory

notes—120 in number. The steamship company took possession, and expended over \$65,000 in making the improvements specified in the lease, and duly paid its notes as they matured, down to April 11, 1866. On the 18th of March, 1866, the government of the city was handed over by the military authorities to its elective officers. On the 18th of April, 1866, the city surveyor, under an order of the city council, approved by the mayor, destroyed the lessee's inclosure, and did damage to the property amounting to \$8000. To restrain further acts of violence and obtain damages for that done, the lessees filed a bill. The notes for rent given by the company, and unpaid at the evacuation of the city by the military authorities, were duly delivered to the elected mayor and common council of the city, who had displaced the military mayor and boards. Those unpaid when the bill was filed were held by the city then, and for several months afterward. They were tendered to the company by a supplemental answer, and deposited in court. The city neither tendered back the money paid by the company, nor disclaimed the validity of the payment, nor offered to return the amount, nor any part of it, expended by the company in making the improvements specified in the lease. It was contended on the part of the city in the court below, and on appeal, that the rights and powers of the military authorities terminated with the cessation of hostilities, and the restoration of business, and that they could not create an interest to last beyond that time; and, too, that no power but the city could alien the rights of the public in property held for its use, and transfer them to an individual or company to the exclusion of the public. The circuit court decreed in favor of the steamship company, and the Supreme Court of the United States affirmed the decree. Mr. Justice SWAYNE, who delivered the opinion, said:

"It has been strenuously insisted that the lease was made by Kennedy without authority, and was therefore void *ab initio*, and that, if this was not so, its efficacy, upon the principle of the *jus post liminium*, wholly ceased when the government of the city was surrendered by the military authorities of the United States to the mayor and council elected under the city charter."

Holding that the appointment of Kennedy as mayor, and of the boards of finance and street-landings were valid, and that they were clothed with the powers and duty of their respective positions, and that the lease was within the scope of their authority, though they had no express authority to occupy, he says: "But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The ques-

tion arises whether the instrument was a fair and reasonable exercise of the authority under which it was made. A large amount of money was to be expended, and was expended, by the lessees. The lease was liable to be annulled if the expenditures were not made, and the work done, within the limited time specified. The war might last many years, or it might at any time cease, and the state and city be restored to their normal condition. The improvements to be made were to the welfare and prosperity of the city. The company had a right to use them for only a limited time. * * * When the military authorities retired, the unpaid notes were all handed over to the city. The city took the place of the United States, and became entitled to all their rights under the contract. * * * The company became bound to the city, in all respects, as it had been before bound to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the funds without an offer to return it, while conducting this litigation. It has also to be borne in mind that there has been no effort of adjustment touching the lasting and valuable improvements made by the company; nor is there any complaint that the company has failed, in any particular, to fulfil their contract. We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards, and the injunction awarded by the court below was properly decreed. The *jus post liminium*, and the law of nuisance, have no application to the case. We do not intend to impugn the general principles that the contracts of the conqueror, touching things in conquered territory, lose their efficacy when his dominion ceases. We decide this case upon its own peculiar circumstances, which are sufficient to take it out of the rule."

Mr. Justice HUNT, who concurred specially, held that: "The reception and holding of the rent is a clear and unqualified act of ratification, which bars the defence of want of authority to execute the lease from which it issued. It is in violation of every principle of honesty and of sound morality that one should retain the benefit of an act of his agent, and at the same time repudiate such act."

It is to be noted that no express authority to make the lease was conferred upon the military mayor and the boards, but their action was sustained as within the lines of their duties as civil officers. Mr. Justice FIELD, who dissented on the ground that when military occupation ceased the property of the city reverted, with the title unimpaired, impliedly admitted that the reception and retention of rent, under the law, ratified it, even though it were the act of unauthorized public agents, but thought that the retention of the proceeds of a

single note for \$666, paid by the lessees, which was all that the city withheld, "might be justified or explained on the grounds consistent with the repudiation of the lease." The obligation to do equity as a condition of relief, here insisted upon, is simply and purely an application of the rule in actions where a contract is sought to be rescinded on the ground of fraud, and nowhere has this wholesome doctrine been more strongly inculcated than in Michigan. *Merrill v. Wilson*, 66 Mich. 243, and cases cited.

But it is argued that the common council exceeded its powers, and that all persons who deal with it are chargeable with notice of the limitations imposed by its charter. The public is exempt from responsibility for the acts of its agents beyond these powers, and no equities can avail the city's grantee, nor can numberless acts of ratification heal defect of authority, or a transgression of the very letter of its charter. This would be true if the contract in question were prohibited by statute, or immoral; but when, as here, there is, at the utmost, only a defect of power, and even though specific performance of the contract might not be enforced, the corporation may be held liable, even at law, on a contract of which it has had the benefit, when it has induced a party, relying on its promise, and in execution of the contract, to spend money and perform his part thereof. This distinction has been frequently recognized and applied. *Hitchcock v. Galveston*, 96 U. S. 351; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Railway Co. v. McCarthy*, 96 U. S. 258-267; *Parkersburg v. Brown*, 106 U. S. 487, 503, 2 Am. & Eng. Corp. Cas. 263; *Chapman v. Douglas Co.*, 107 U. S. 355, 2 Am. & Eng. Corp. Cas. 71; *Bank v. Townsend*, 139 U. S. 67, 71; *East St. Louis v. St. Louis Gas-light, etc., Co.*, 98 Ill. 415. If a court of law may go to this extent in enforcing the claims of common honesty, can there be doubt that a court of equity may mould its decree to the same end under like conditions? It is conceded that, were the city an individual, its attempt to repudiate its solemn obligations, recognized by it for a period nearly equal to that prescribed by the statute of limitation for bringing real actions, would justly be held wanting in good faith, but it is said that this rule cannot be enforced against a municipality. Do courts of equity extend immunity to municipal dishonesty? I find no warrant for that doctrine. "The obligation to do justice rests upon all persons, natural or artificial; and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Marsh v. Fulton Co.*, 10 Wall. 676; *Louisiana v. Wood*, 102 U. S. 299; *Chapman v. Douglas*

Co., 107 U. S. 355, 2 Am. & Eng. Corp. Cas. 71; *Bank v. Townsend*, 139 U. S. 75; *Clark v. Saline Co.*, 9 Neb. 516.

Or, as put in the vigorous language of Chief Justice FIELD, in *Pimental v. San Francisco*, 21 Cal. 362, "where the city, under a void ordinance, sold certain of its property, and retained the proceeds, and, when sued for the amounts, pleaded the invalidity of the ordinance, and sought to escape liability on the ground that the city was under no obligation to respond for the acts of its officers under that ordinance," the chief justice said: "The city is not exempt from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtained the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtained other property, which does not belong to her, it is her duty to restore it, or to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution, and we do not appreciate the morality which denies, in such cases, any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its end, always, is to do justice."

I am unable to perceive any distinction between the morality of retaining money dishonestly acquired, and that involved in denying compensation for expenditures and investments made in good faith, on the express request and assurance of the individual or corporation, private or public, which has obtained, and still holds, the benefit of such outlays. Nor is it easy to see the honesty or equity of permitting the municipality to pocket the taxes which it has received under the very ordinance it seeks to repudiate, until the statute of limitations has run against their recovery by the defrauded party. But it is not true that the law casts upon a party dealing with a municipal corporation all the consequences of a misconstruction of its powers, and leaves him remediless. Where there has been a practical construction of its charter given by the authorities of a municipality and that construction, though of doubtful validity, has been acted upon by it, and rights have grown up under it, the court shall uphold it, in favor of one who has dealt in good faith. *Van Hostrup v. Madison*, 1 Wall. 297; *Chicago v. Sheldon*, 9 Wall. 54; *Insurance Co. v. Hoge*, 21 How. 35, 36; *U. S. v. Union Pac. R. Co.*, 37 Fed. Rep. 551; *U. S. v. Hill*, 120 U. S. 169, *Brown v. State*, 5 Colo. 496; *Port Huron v. McCall*, 46 Mich. 565; *Cameron v. Bank*, 36 Mich. 240.

Upon the theory that the maintenance and operation of the

railway in the streets is a public nuisance, the complainant's case is equally unsustainable. There is no averment or allegation which, under any system of pleading, or by the extremest stretch of liberality, can be tortured into a charge that the defendants' occupancy of the streets is either a public or a private nuisance, cognizable in equity, or that the right to the relief here asked is predicated on that theory. Whether or not a given use of a highway is a nuisance, is a question of fact, to be tried on apt allegations. "When the highway is not restricted in its dedication to some particular mode of use," says Judge Cooley, "it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience, or even injury, of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods it would defeat, in a greater or less degree, the purposes for which highways are established." *Macomber v. Nichols*, 34 Mich. 216. Again he says, in *Railroad v. Heisel*, 38 Mich. 66: "A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted, because it constitutes a relief to the street. It is in furtherance of the purpose for which the street is established, and relieves the pressure of local travel, instead of constituting an embarrassment." And Judge Grant, on the same subject, says that "the street railways have become, not only a convenience, but a necessity, to the people." *Railway v. Mills*, 85 Mich. 648, 46 Am. & Eng. R. Cas. 608. They cannot, therefore, be, *per se*, a nuisance. See, also, *Attorney-General v. Metropolitan R. R.*, 125 Mass. 516-518. Indeed, the bill practically admits this, in its lack of averment, and notably in concession that the object sought by the bill is purely the resale of the license to some other corporation, which will pay a larger sum for the privilege now exercised by the defendant. But while admitted that the use of the streets sought to be enjoined is consistent with the public easement of travel, the conclusion is reached that the extension of the easement by the common council being void, as wholly *ultra vires* the city, the defendant's occupancy of the streets with its tracks, and in the operation of its railway, being therefore unauthorized by law, it is the province and duty of a court of equity to enjoin such use. The only authority cited for this conclusion is *Denver v. Denver City Ry. Co.*, 2 Colo. 673. The case cites *Davis v. Mayor*, 14

N. Y. 525, which, in its turn, cites several authorities holding that the unauthorized obstruction of the public highway is a nuisance—a proposition which, in the abstract, no one will question. Nor is it denied that, in a proper case, equity will enjoin the continuance of such an obstruction. But in this state it is held that a public nuisance must be something that subjects the public to inconvenience or annoyance. The mere use of the street does not make out the offence. *People v. Carpenter*, 1 Mich. 273; *Clark v. Ice Co.*, 24 Mich. 508; *Attorney-General v. Evart Booming Co.*, 34 Mich. 462; *Everett v. City of Marquette*, 53 Mich. 450-452.

In the latter case the common council had granted complainant a license to construct a railway from the sidewalk down to the basement of his store. Ten years afterward the council directed the stairway to be removed, and the opening in the sidewalk closed. It was contended on the part of the city that the common council had no power to give permission for the permanent appropriation of any one of the public streets for private purposes. Referring to the permission granted by the first council, Judge COOLEY said: "If the permission was effectual for no other purpose, it at least rebutted any presumption, which might otherwise have existed, that this practical appropriation of the street was, *per se*, a nuisance. If the permission was a mere license, and the subsequent action of the city council is to be regarded as a revocation of the license, it does not follow that the plaintiff had, by the revocation, immediately been converted into a wrongdoer."

The decree of the court below awarded a perpetual injunction against the city, which the supreme court affirmed. It seems to me impossible to reconcile this case with the conclusion of the circuit judge that the revocation of the ordinance of 1879 by that of March 29, 1892, operated to convert the defendants into wrong-doers, and make them amenable to injunction. To warrant the interposition of a court of equity against unauthorized acts, even at the instance of the state, there must be a tangible grievance—a substantial invasion of the public right. *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 516; *Brick Co. v. Foster*, 115 Mass. 432-438; *Attorney-General v. Sheffield Gas Consumers' Co.*, 3 De Gex, M. & G. 304-320, on appeal 4 Ch. App. 71. It may be said, in this connection that it admits of grave doubt whether, in its corporate capacity, the city can maintain this bill, under any conditions, to redress a public grievance. Its standing as complainant in the case, where it sought like relief against the occupation of its streets by a railroad company, was characterized "as not by any means clear, upon the authorities."

Detroit v. Detroit, etc., R. Co., 23 Mich. 216. See, also, City of Georgetown v. Alexandria Canal Co., 12 Pet. 97.

2. As a bill *quia timet*, it must fail. Frost v. Spitley, 121 U. S. 552. The second question, of almost equal importance, is, conceding that the city exceeded its powers in granting an extension of the easement in its streets for a period beyond the life of the grantee, will a court of equity relieve either party from the contract? Upon this question the case of St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, leaves nothing to be said. It is conclusive against the complainant. If, as is claimed, the city acted *ultra vires* in the extension of the easement granted to the Detroit City Railway Company, and the latter exceeded its chartered powers in accepting the grant, both are in *pari delicto*, and can have no relief. If the street railway, by mistaken construction of the city's charter, is precluded from compensation for its expenditures, and recovery of the sums paid for taxes, as is held by the circuit judge, is the same mistake of law on the part of the municipality to be made a ground for granting it affirmative relief? The only answer to the case last cited necessarily affirms this strange result, for which I can find no sanction.

3. The construction given to section 34 of the tram-railway act (which makes the consent of the municipal authorities the condition precedent to the local exercise of its franchises by a street-railway), by which it is interpreted as a limitation of the power upon the city to grant, and of the corporation to receive, the easement in question, seems to me an utter perversion of its purpose. Independent of that section, and under the powers conferred by its charter, the city could license the use of its streets by such corporations, the privilege being in furtherance of the purpose of the street, although it could not grant an exclusive right. That section has been thus authoritatively construed: "The purpose of section 34, in allowing street railways to be organized under it on such terms as should be agreed upon, was to enable the roads and the cities to fix upon some equitable standard of local taxation for municipal purposes." City of Detroit v. Detroit Ry. Co., 76 Mich. 425, 39 Am. & Eng. R. Cas. 538.

This construction of section 34 binds this court. By section 12 of the act of 1855, companies formed thereunder may acquire and sell real and other property for their uses, and the same right is conferred by section 15 of the street-railway act (chapter 95, 1 How. St. p. 911), which by section 29, gives to companies formed under the tram-railway act all the rights, powers, and privileges granted by it. It has not been contended that either of those sections disabled such corporations from acquiring the fee of realty, or the absolute title to

any other property. Had it been the purpose of section 34 to restrict the dealings of the company with the municipality, that intent would have been so easy of expression that the absence of a prohibitory or limitation clause is persuasive, *per se*, that the term as well as the conditions of the easement were committed to the wisdom and integrity of the city authorities, who were vested with the contract power of the city. *Putnam v. Grand Rapids*, 58 Mich. 419. But it is said that, if it be held that the city may grant to a corporation a privilege extending beyond its corporate life, it necessarily follows that it may make a grant in perpetuity. There are several answers to this proposition: (1) This case does not involve the power to make a perpetual grant. The question here is whether the extension of the easement for 16 years, for the considerations received by the city, was a reasonable exercise of the municipal power. It does not follow from the fact that power is liable to be abused that it does not exist. If the power is abused, the remedy is with the legislature. *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 367; *Gilman v. Philadelphia*, 3 Wall. 732. (2) The legislature alone can challenge the propriety of the exercise of the power. It has reserved to itself the power to annul, alter, and repeal both the municipal and the corporate charter. Whether the city or its grantee have transgressed their organic acts is solely for the state. If the company acquires more property, or a larger estate, than the legislature has authorized it to receive, the other party to the contract cannot object, when the contract has been perfected by extension. *Railway Co. v. Mills*, 85 Mich. 648, 46 Am. & Eng. R. Cas. 608, and cases cited; *Jones v. Habersham*, 107 U. S. 174; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 399.

Another argument for the construction that the grant must be limited to the life of the corporation is that such a construction consists with the policy of the state relative to corporations. It has been aptly said of this argument that the supposed policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each varying from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of the statutes. *Hadden v. Collector*, 5 Wall. 111; *Railway Co. v. Phelps*, 137 U. S. 536, 168. Again it is said that it is not the function of a court of equity to decide, even upon all the facts in the case, whether the contracting question is or is not a reasonable exercise of the municipal power. That, however, was exactly the question decided by the supreme court in *New Orleans v. Steamship Co.*, 20 Wall.

387. There is no legal obstruction to prevent the court from passing on that feature of the case. Is there any practical difficulty attending the solution of the inquiry? It is a mere question of mathematics—a schoolboy's problem.

Given an enterprise, the construction, equipment, and operation of a railway for example, for thirty years—the company to furnish the funds, and take all the hazards of the business and of remunerative returns, and to pay a prescribed percentage of its gross receipts in return for the license—is the contract a reasonable one for the grantor of the license, having in mind the amount of the investment required, the equalization of the burdens of municipal taxation among the community, and the increased facilities of cheap transportation? That it may result eventually in large returns to the investors is plainly not a negation of its fairness now. If it fail to prove as remunerative as expected, can the grantee, on that ground, escape his burdens? If acted upon for 14 years, and regarded by both parties as superseding a prior contract and defining their relations, and affirmed by one party as the basis of recovery against the other, by successful litigation, there is no principle, consistent with sound morality, that will permit its reasonableness, or even its constitutionality, to be questioned now, at the suit of the grantor, who seeks, in bad faith, to impugn its own grant. *Daniels v. Tearney*, 102 U. S. 421.

The bill should be dismissed, with costs.

CITIZENS' STREET R. CO.

v.

CITY OF MEMPHIS *et al.*

(*U. S. Circuit Court, W. D. Tennessee, Jan. 4, 1898, 68 Fed. Rep. 736.*)

Street Railways — Consolidation — Obligation of Contract in Original Charter—Federal Jurisdiction.—Certain street railway corporations, organized before the adoption of the Tennessee constitution in 1870, consolidated their property and franchises after the adoption of the said constitution. Nothing in the constitution or subsequent acts of the legislature indicated any intention to deprive such consolidating companies of any privileges or franchises exercised under their old charter. The said constitution required all corporations to be formed in pursuance of the general laws, whereas the said consolidating companies had been organized under special charters. *Held*, that, under the rule that the presumption must be that the consolidated company preserves its original charter rights and burdens intact, unless the contrary is expressed, the said corporations did not, by the act of consolidation, subject the irrevocable rights granted by

the original charters to the dominion of the state ; and neither the state nor a city thereof could take away from the consolidated company the right to use a certain street, under a right granted by the original charters to operate a street railway "on all or any of the streets in the city."

Same—General Control of Street Railways—Municipal Usurpations of State Power.—Although a city has the right to regulate and control the use by street-car companies of the city streets, and street-railway franchises are granted by the legislature subject to that power, such regulation cannot be enlarged into a power of prohibition ; nor can the city usurp the state power of creating franchises or taking them away, and a street-railway company duly organized can be deprived of its rights to use the streets of a city only by its own consent.

Abandonment of Right to Use Street—Clear Intention Must Appear.—It will not be understood that a street-railway company has abandoned its right to use a certain street, unless its intention so to do has been unequivocally expressed. Therefore, where a street-car company which had constructed railways on certain streets contracted with the city to substitute electric-power for horse-power within two years, it could not be contended that the company had abandoned its right to use a certain street, although it had made but a limited use of the said street as a spur-track and the like, and new tracks had not been laid upon the said street before the company had obtained from the city the surrender of certain bonds which it had given as security for the completion of the system, in accordance with the contract ; and the railway company could, at any time within the two years, make use of the said street for the accommodation of its business.

ACTION to restrain defendants from interfering with plaintiff in constructing street-railway tracks.

Turley & Wright, for the motion.

Metcalf & Walker, opposed.

HAMMOND, J.—The troublesome question in this case is that of our jurisdiction. The defendant city contends that the power to alter or repeal the charter of the plaintiff company is absolute, and, therefore, that there can be no inviolable obligation of the contract, arising out of the charter, to be protected by the federal constitution, which forbids any state to pass a law impairing the obligation of contracts ; wherefore it contends that no federal question is presented to sustain our jurisdiction, and that whatever rights the plaintiff may have, either of property or action, or whatever injuries it may have received at the hands of the city authorities, are matters solely within the jurisdiction of the state, and cognizable only in its tribunals, like all other rights or injuries with which the federal authority has no concern. If it were certain that the state had the power to alter and repeal the plaintiff's charter at will, I should be inclined to take the defendant's view of this question, and hold that, so far as this particular article of the federal constitution is concerned, no federal question could be presented, under such a charter ; because what the

Railway charter—Repeal—Obligation of contracts.

state might do of itself it could do by its municipal agencies as well, and whether or not the state had authorized such an agency to do such a thing as that complained of, or whether or not the state had the power, under its constitution, to confer such authority on the given agency, and the like, would present no federal question, but one only of the law of the state, apart from its connection with the other. There are intricacies of this subject, I know, arising out of the consideration that it is impossible to take any contract—or its obligation, rather—out of that protection afforded unreservedly by the federal constitution to all contracts, whether they be private contracts, purely, or charter contracts, by special or general law, and that this impossibility necessarily imposes always a federal inquiry whenever complaint is made that the obligation—whatever it may be, much or little—has been impaired by state legislation. Whether a reservation—for example, to alter, amend, or repeal a charter—is operative to protect the particular legislation against the imputation of federal prohibition may be, it is said, itself a federal question to support the jurisdiction; just as in a purely private contract there may be a reservation of power of revocation to either party; but it does not follow that the state, because of such reservation, may pass a law impairing the obligation of that class of contracts, or that the class is exempt from the influence of the federal prohibition. But I do not care, at this time, to go into these intricacies of constitutional construction.

Charters of incorporation are peculiar contracts, which have been—by grace or favor, it has been said by some—placed upon an equality with private contracts in this matter of federal protection against state legislation impairing their obligation, by the celebrated Dartmouth College Case; and it has been generally thought that the state might avoid the tremendous restrictions placed by that case upon their authority over corporations, and retain to themselves what many believe to be a wise power of absolute dominion, by agreeing with each incorporation at the time of the charter, as a part of the contract, and of its obligation, that this power of absolute dominion should exist, and the state be at liberty, whenever it chooses, to not only impair the obligation of the charter contract by amendment or other alteration, but, by repeal, to destroy it wholly; or, by importing such a reservation of power into all charters, by a constitutional provision to that effect, to preserve this absolute dominion over them. *Water Co. v. Clark*, 143 U. S. 1, 38 Am. & Eng. Corp. Cas. 627. Under such a charter it would seem that no federal question could arise, as to impairing its obligation, for the plain reason

that the power to do that thing is reserved. Whether the state has exercised the power or not, or whether the state has or has not, in fact, authorized one of its municipalities to exercise the power for it, or whether the particular action of the municipality comes within its granted powers, and the like, are all, under such a charter, mere questions of state law, with which the federal constitution can, in the nature of the thing, have no concern whatever. It may be that such a state of law, and such absolute dominion, would make corporation property and franchises unsafe and unstable, but that is an infirmity of the state law, and not of the federal constitution, and investors would consider that infirmity when making their investments; but, justly, they could not rely upon federal authority for help in their distress upon the question whether the state had or had not injured their property and franchises, whether it had left them in full enjoyment of these franchises, or armed its agencies with powers to injure them. These would not be federal questions at all. I say, again, the fulness of this doctrine, as contended for by the defendants' counsel, will be conceded by the court here, for the purposes we now have in hand. But I do not think the plaintiff's charter is subject to such absolute dominion by the state, and perhaps no charter can be, whether before or after the constitution of 1870; but of that we need not inquire at this time.

The plaintiff company owes its origin to two companies—one chartered in 1865, known as the Memphis City Railroad Company, and the other chartered in 1866, known as the Citizens' Street Railroad Company. These charters, of course, were unaffected by the constitutional provisions of 1870, now under consideration, and were fully under the protection of the federal constitution, in the matter of the inviolability of their charter contracts. How have they lost this advantage, if at all? It is said that by consolidation into one company a new corporation has been formed, the old ones dissolved, and the new brought within the constitutional reservation of the power to alter, amend, or repeal a charter, and thereby subject to this absolute dominion which the state has reserved over all charters granted since 1870; and to support this position a class of cases to be presently noticed is relied upon by the city. Undoubtedly this result must follow, if the legislature has intended it, and if it has the constitutional power to effect that intention. Nothing in the legislation, by express terms, manifests any intention to deprive the old corporations of the advantage of any right or immunity that they had under their charters, but, upon the contrary, they are all expressly preserved to them, notwithstanding the consolidation. Neces-

Consolidation
—Effect on old
charters—
Federal Juris-
diction.

sarily a consolidated corporation must be, in a certain sense, a new corporation; but not necessarily, in every sense, nor in the fullest sense, must it be so entirely new that the old corporation is extinct. There is nothing in the nature of the subject-matter, nor of the process of consolidation, that requires this extinction of the old corporations to make the new. It may be done, or it may not. Whether it be desirable to the state and the corporations involved, or to either party to the contract, to extinguish the old charters entirely, or to preserve them in whole or in part, depends upon the circumstances, and whether they have agreed to that extinction or not; for, be it remembered, it is a matter of agreement between them—depends upon the nature and character of the purposes they have in view in effecting the new arrangement. Now, it is to be supposed that these old companies desired or were willing, for the mere privilege of consolidation, to surrender their old charter rights including that involved here of inviolability of the contract, or that the state, in consideration of the grant of that privilege, imposed such a surrender upon them? Naturally, if the consolidation could be constitutionally effected without this, the companies would desire it, and, if they have surrendered that inviolability, such purpose would be manifested in the legislation itself, and not left to implication; and, on the other hand, the state would have insisted that the surrender, and the intention to impose it, should be plainly manifested and secured by the agreement—that is to say, by the legislation—itself. Contrary to this, as I shall undertake to show presently, the form of the legislation, its historical surroundings, and its appearances of substance and phraseology, are all against the idea of any open and unconcealed purpose of both parties to this agreement of consolidation that the old charters should be surrendered, in the sense that they became extinct; or of the state, that it would in open and unconcealed terms, impose this surrender as a consideration for the newly-granted privilege of consolidation; and there seems to be provided the appliances necessary for the convenience of the companies which enable them to obtain the benefits of administration through one company, rather than two, such as a new name or a consolidated name, and a privilege of being a new corporate entity, instead of a double-headed concern, and the like, the possession of which would not be inconsistent at all with a retention of all its rights, immunities, and privileges; including again, I say, this more valuable one, of inviolability of its charter rights, and, incidentally (and I say this particularly because it is, in my judgment, only an incident, and in the just sense a quite unimportant and immaterial one, but still one especially involved

here), the supplemental option of appealing to the federal tribunals to protect that inviolability. The truth is, if any surrender has taken place, it is by implication only; and that implication arises out of the operation and effect of the constitutional provision upon that which the parties have done in a form which is wholly inconsistent with the notion that they intended on the one hand, to impose the surrender, and on the other to accept it.

But, before going into the legislation with this purpose in view, it is best to consider somewhat further the powers of the state in that behalf. Apart from constitutional restrictions, the legislature, having the most plenary power of providing for the consolidation of companies to make a new corporation, with new rights and privileges, or partly new and partly old, may preserve the old in whole or in part, in substance and in fact, and clothe the old corporation with a new name, and, if necessary, with all the incidents of a new company, which is to possess absolutely all the old rights, immunities, and privileges, including the inviolability of these charter rights. Indeed, the legislation should not violate the chartered rights, which would be to violate the federal constitution, and this immunity of inviolability it cannot touch without the consent of the old company, however plenary the powers of the state may be under its own constitution. Where have these companies ever consented to surrender this inviolability, and where is the evidence of it? If at all, it can only be by implication upon this new constitutional provision in relation to future corporations, and from the fact that they have accepted the importation into their charters of a clause that they shall be subject to any alteration, amendment, or repeal by the state, and the vehicle of this importation is this eighth section of article 11 of the constitution of 1870. In other words, they have agreed, by consolidating under a general law, that the legislature may at any time repeal their charters, which were before the agreement irrepealable. This is a stupendous result, which the ordinary rules of statutory construction would forbid that we should impose upon a party to a contract by any implication not clearly necessary, from the nature, terms, and scope of the agreement itself. Think for a moment what these companies have done. For the relatively paltry consideration of a consolidation, which has, by its very words and clearly-manifested intention, added not one iota of chartered privileges of any kind, except the privilege of uniting into one company instead of remaining two, they have agreed to permit the legislature to repeal hitherto irrepealable charters, and drive the two companies out of existence, at its will; take the

streets away from them, and give their use for city transportation traffic to another, if it chooses; and this, too, when, with some inconvenience, the two companies might have continued to exist and get along very well without consolidation. It is obvious to my mind that this was not a result understandingly agreed upon between the state and these two companies, nor was the legislation out of which the result arises projected upon an understanding between the legislature and the companies that it would be a necessary consequence of the proposed consolidation. There was, in fact, no necessity whatever for any legislation like this general law of consolidation, if that was to be its effect. All that was needed was to organize a new company under our general law for chartering street railroads, and make under that law the contracts that were made with the city.

The very existence of this special act (in a certain sense) for organizing new companies by the consolidation of old is a protest against the notion that the old charters have been surrendered for a new charter, when there was already a general law for new companies amply sufficient for such a purpose. Again, possibly this general law for the organization of street-railroad companies, applicable to all companies wishing to avail themselves of it, is the only kind of law the legislature has the power to pass, under this very constitutional provision we have in hand; for how can the legislature, by a general or special law, grant privileges and immunities to old corporations not granted to any that are new, or to new corporations made out of old ones not granted to new corporations made *de novo*—if this legislation for consolidation is to be taken as a general law, having the effect to create an absolutely new corporation, stripped of its old charters, and the old charters extinguished? We must not be confused by terms. Such a law would be a special act, in effect, though general in appearance; granting to one class of citizens—the fortunate possessors of old charters, namely—special privileges, not granted to a less fortunate class of citizens—those possessing new charters under the general law, namely. The legislature, under such a construction of this provision of the constitution as the city claims, would have no more power to confer, by general law or otherwise, upon a new corporation made by consolidation out of old corporations, special privileges, than upon any other class of citizens, nor could it do this by reference to the old charters for a description of the privileges conferred more than by an apt description *de novo*, nor would the privileges so conferred be any less special because they are similar to, or identical with, other privileges conferred upon other companies by general or special law.

They would come of a special law, in fact, however large or general might be its application to special individuals coming under it. The largeness of the class would not make class legislation any less special, and this is what is forbidden by the constitution. In other words, if the constitution and this legislation are to be construed as the city construes them, the legislation is itself unconstitutional. The legislature cannot confer, since 1870, special privileges upon a class by merely incorporating a provision in the new charter that it shall be subject to change or repeal by the legislature; nor can it confer such privileges by revamping old charters, and adding, by constitutional implication or otherwise, a clause to that effect. The existence of this clause in any way does not enlarge the power of the legislature in this respect of legislating for a class to which others may not attach themselves.

Let us illustrate this by supposing that companies A. and B. existed prior to 1870, as the plaintiff's predecessors did; that companies C. and D. exist, under our general street-railroad act, since 1870; that company A. had the privilege, under its charter, of charging a fare of 10 cents, which is forbidden to the other three; that A. and B., under this street-railway consolidation act, become, as the city contends, a new company, E., with the old charters extinct, and useful only for reference, to learn by the description the privileges conferred by the consolidation act upon the new company, E.; and that E. charges, and there is conceded to it, the 10-cent fare. It is not plain enough that, in the teeth of this provision of our constitution, a special privilege has been created, by a general law, forsooth, for a corporation created since 1870, which C. and D., to say nothing of all other street-railroad companies, cannot enjoy, unless the legislature gives it to them all alike by a general law forced upon it, because one company has it under such legislation as this, or else that the 10-cent fare is an unconstitutional grant to E.? What is true of this special privilege is equally true of all the other privileges which are special in the sense of being derived from special legislation, class legislation; that is to say, particular individual legislation it would be in the case supposed, although the privileges might not be special in the sense of being exclusive, as in the 10-cent fare case. If it be said that this was a grant under the old constitution, and, being good as such, remains good under the new, the reply is that it was not a grant to E. Moreover, B., one of the constituent companies, has acquired it by consolidation, and C. and D. are left out, and to that extent it is newly granted, at the very least. But if it be well granted because of the old constitution, to save the contention of the defendant here, why is not

the old constitution equally available to save the contention of the plaintiff here—that, although a new corporation, it has its old charter rights, including that of an inviolability of its charter contracts? And is it not equally plain that if the clause, “this charter may at any time be altered or repealed,” should be written into the old charters by the pen of constitutional implication or otherwise, such insertion would not save the legislation from this constitutional objection? How can you write such a clause as that into an old charter? You may write it, and the constitution does write it, into a new charter; but this new charter, under this new constitution, must be, not a special charter, like the old, but a general charter for each and every corporation like it in business and purposes, or like it in conditions, and which shall be common to all coming within those conditions. You cannot make such a general charter by preserving the old special charter, and writing this clause in it. If the old charter is dead, or has no other function than that of description for new charters, then that description must cease to describe special rights, privileges, etc., for a particular corporation, and to describe rights, privileges, etc., for all similar corporations in the state, and all citizens must be free to procure a like charter, if they wish, and these privileges cannot be confined to individuals. This legislation is not at all of that character, and was not so projected, as any one may see who reads it.

Again, it is one thing to write this clause into general laws organizing corporations hereafter created—to use the language of the constitution—and a stupendously different thing to write it into the old special charters of the state by any process whatever. So it is one thing to provide that the general laws authorizing the old special charter companies to consolidate shall be subject to alteration and repeal, and just as vastly a different thing to provide that their old special charters shall be subject to alteration and repeal. The constitution says nothing about the latter process, directly or indirectly; and, if the power to do that thing exists, it is upon an implication on a clearly expressed provision to secure the former of these two different things—so vastly different, as I think, that they have no just relation to each other. I do not doubt the power of a constitutional convention to determine that the insertion of this saving clause of reservation of dominion over corporations is so important that it should forbid the legislature to pass any act, general or special, in relation to old charters, from which it had been omitted, unless, as a condition precedent to taking any benefit of such legislation, the old companies should agree that their charters should be so amended as to insert this clause of reservation. I only say

I do not doubt this power for the purposes we have now on hand, for serious objections might be raised to such a prohibition, under our existing federal constitution; but I do say that in my opinion the constitutional convention of 1870 did not insert such a prohibition, or anything like it or akin to it, by section 8 of article 11 of that instrument. Nor do I doubt, in the same way, but that the legislature might adopt that policy, also, and determine, whenever it was asked to legislate for the benefit of the old charter companies, that it would withhold such benefit unless they agreed to amend their charters by the insertion of the dominion clause in them. But, likewise, I say that this legislation manifests no such intention, but, on the contrary, is, in form and purpose, upon the face of it, antagonistic to that notion, when read in the light of these views as to the relation of the parcels of legislation, constitutional and parliamentary, to each other.

Let us read them chronologically, for the purpose of comparison and contrast, and with the object of observing the intention displayed by fixing their relation to each other. First take the constitution of 1834, § 7, art. 11: "The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law: provided, always, the legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

Remember carefully that the first sentence of this article does not apply to the grant of charters of incorporation, they being saved by the proviso, which left to the legislature the most plenary power as to them, while the first sentence of the corresponding section of the constitution of 1870 does apply to corporations, the proviso being omitted, and finding a substitute in the second sentence of section 8, art. 11, which we will now also read: "The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. No corporation shall be created, or its powers increased or diminished, by special laws; but the general assembly

shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested."

The proviso of 1834 remained, and yet remains, the foundation for all charters granted before 1870. Under article 1, § 10, of the constitution of the United States declaring that "no state shall pass any law impairing the obligation of contracts," as interpreted by the Dartmouth College Case, this first sentence of section 7 of the constitution of 1834 could not be made to apply to the two charters of the plaintiff company granted in 1865 and 1866, by becoming the first sentence of section 8 of the constitution of 1870, any more than it applied under the constitution of 1834; and it was not within the competency of the constitutional convention of 1870, by omitting the proviso, to let the bottom out of all old charters, and sink their corporations into the depths of death and oblivion. That proviso must always remain effective to sustain those charters, at least as to their foundation, if it does not remain by implication, as to them, for the broader purpose of conserving the public interest by permitting the legislature to legislate generally or specially as to them wherever the public interest demands. So remaining as a foundation only, those old charters are exempt from the operation on them of the first sentence of the constitution of 1870. Just as plainly it remains to exempt them, also, from the restrictions of its substitute of 1870 or the second sentence of that section, so far, at the very least, as those restrictions would operate to write in those charters the formulary that would restore to the state a dominion which it gave up by neglecting to insert the reservation clause to alter or repeal the charters. Only by their consent, express or implied, could these restrictions be applied to defeat the charter rights already existing. They might be made to apply to any amendments of the charters, but not the original instruments. *Non constat* that because the amendments are subject to alteration or repeal the original charters must be. By the terms of the section (if it applies to old corporations at all, which I doubt) their powers are not to be increased or diminished by special laws. Surely, if they need the increased power of uniting two of them into one, the power may be granted to the two by a general law admitting other like corporations, in like conditions, to the privilege, if they choose, and it cannot be granted by any special law conferring it upon these two; or, if they need an increased privilege, of taking a new name for the consolidated entity, or of changing its organization of administrative machinery, and in that sense to be a new corporation, this additional privilege

must also be granted by a general and not a special law, and this general law may be altered or repealed, and this is all there is of that. *Non constat*, again, that these changes or amendments or grants of increased powers and privileges by general laws, few or many, subject to repeal or alteration, have the implied effect (necessarily implied, I mean) of bringing the old charters into a moribund condition—"dead as a door-nail," as counsel expressed it in argument—establishing an entirely new corporation, with a new charter, the whole of which is subject to alteration or repeal, or of writing a clause to that effect in the old charters, if, for any vital purpose, they remain in force in any respect whatever. So far from being a necessary implication, such consequences are not logically connected with the language used by the instrument, in my judgment.

Again, this section is confined to the "organization" of corporations "hereafter created," and it is these "laws" which are to be subject to alteration or repeal. Possibly this refers to corporations entirely new, and having no element of special existence under former laws, and excludes all the old corporations, so that they remain subject to the plenary power of the legislature under the old constitution, less the restrictions of the federal constitution, indeed, but otherwise unrestricted altogether. This construction might gather force from the very last clause—"and no such alteration or repeal shall interfere with or divest rights which have become vested." Possibly this, taken along with the phrase, "for the organization of all corporations hereafter created," indicates that the whole constitutional contrivance is to be taken as wholly excluding old charters from its operation, and leaving those corporations under the old law, and not under the new. But, whether this be so or not, certainly the entire language used, analyzed in this way, precludes the notion that the legislature has lost the power to consolidate old corporations under new names, and new organizations with their old charters intact, including their inviolability, under the federal constitution, and that, *ipso facto*, when such a new corporation is organized, it brings, by its own acceptance, its old charter under the bonds of this new constitution; that is to say, that this constitution drags the old charters under its wheels whenever there is any legislation about them that increases their powers by a general law. The power may have existed in the constitutional convention to do this, but it was not exercised in this section; and in my opinion the legislature of Tennessee still has the authority to deal with old corporations by general laws increasing their powers, and to permit them to consolidate and "be a new corporation" without in the

least diminishing, by any necessary implication from that bare fact, their chartered rights, and that those rights may remain wholly intact, including the federal inviolability for the old charter, in such new corporation, and that in the absence of a clearly manifested intention to destroy the old charter, and create a new company with a new charter, this is essentially the intention of any legislation on the subject, because it is the required and absolutely necessary intention, unless the parties both agree to have it otherwise. It is the natural, logical, and congenital product of the two constitutions—that under which the original creation was had, and that under which the changes have been made. The public interest, in any view we take of it, requires that this power should be continued as to old charters and corporations rather than destroyed; and its destruction will not be presumed, upon such a section as this we have here. This sufficiently justifies the judgment as to the constitution.

Let us now turn to the legislation, and observe how it conforms to a belief in, and an intention to exercise, this very power in this very case, whatever other powers might have been exercised if the legislature had chosen. First let us read the two old charters—that of the Memphis City Railroad Company, of June 7, 1865, and that of the Citizens' Street Railroad Company, of May 23, 1866:

CHARTER.

"An act to incorporate the Memphis City Railroad Company.

"Section 1. Be it enacted by the general assembly of the state of Tennessee that William R. Moore, I. M. Hill, S. B. Beaumont, R. Hough, Wm. M. Farrington, Frank Taft, G. P. Ware, S. R. Wood, Fielding Hurst, P. E. Bland, Joseph Bruce, Abner, Taylor, Thomas R. Smith, H. B. Wells, Joseph W. Eystra, Wm. C. Bryan, W. P. Hepburn, and Frank Brooks, and their associates, be, and they are hereby, constituted a body politic and corporate, under the name and style of the Memphis City Railroad Company, and by that name may have succession for the term of thirty years; may sue and be sued, plead and be impleaded with; may have and use a common seal; may purchase and hold such personal and real estate as, in the opinion of the directors, may be necessary for carrying on the business of the corporation, and the same to sell and dispose of at pleasure; may make all needful by-laws for their government not inconsistent or in conflict with the laws of the state of Tennessee and the United States.

"Sec. 2. Be it further enacted that the capital stock of said

company shall be three hundred thousand dollars, with the right and privilege on the part of said company to make it five hundred thousand dollars, which shall be divided into shares of fifty dollars each, and the same may be subscribed to and made subject to such calls and times of payment as said directors, hereinafter provided for, shall designate.

"Sec. 3. Be it further enacted that the persons above named shall, within one year after this act, meet and elect five of their number, by ballot, to act as directors of said company, and thereupon said directors shall choose one of their number to act as president, and may elect such other officers as they may think necessary, and fix the salary of the same, said officers to remain in office one year, and until their successors shall be duly elected; and at the end of one year after the election of such directors, and annually thereafter, after thirty days' notice to be given by the president and secretary, or either of them, in a newspaper published in the city of Memphis, of the time and place of such election, the stockholders shall meet and elect five directors for the ensuing year, each stockholder to have one vote for each share of stock held by him or her. Said directors shall thereupon proceed to organize as above provided, for the organization of said board of directors, and so on annually during the existence of this charter. Said stockholders may vote in person or by proxy. Three of said directors shall constitute a quorum for the transaction of business.

"Sec. 4. Be it further enacted that said company, by their said directors and officers, shall have power to make, complete, and execute all contracts and agreements entered into with the city of Memphis or other parties, for any purpose whatever, connected either directly or indirectly with the construction, maintaining, or operating said railway, and may alter or enlarge the term of the same with said parties, and may construct, maintain, use, and operate street railways, by animal power, on all or any of the streets in the city of Memphis, in the state of Tennessee, for that purpose, using all necessary machinery and equipments; said company to use neatly constructed connections and safe cars, to be well adapted to such use and purpose; may enter into all necessary contracts for the building and operating of said railroad, and declare dividends on the capital stock of the same.

"Sec. 5. Be it further enacted that this act shall be so construed as to authorize said company to construct, maintain, and operate said railway in the streets of the towns or villages of Chelsea and Ft. Pickering, in all respects the same as in the city of Memphis; provided, that this act shall be so con-

strued as not to grant either the indorsement of the state or the loan of any bonds.

"Sec. 6. Be it further enacted that each stockholder shall be individually liable to the creditors of said company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of said company, until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of said company shall be jointly liable for all the debts due or owing to any of its laborers and servants for services performed for said corporation, but shall not be liable to an action therefor before any execution shall be returned unsatisfied in whole or in part against the said corporation, and then the amount due on such execution shall be the amount recoverable, with costs, against such stockholders.

"Sec. 7. Be it further enacted that said railroad shall be constructed on the most approved plan for the construction of street railroads, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of Memphis may from time to time, by ordinance, prescribe, and to the payment to the city of such license, annually, for each car run thereon, as they may, by ordinance, prescribe; and the persons and their assigns are hereby authorized to charge at the rate of five cents for the conveyance of passengers for the whole or any part of the route from the depot to any terminus of said railroad.

"Sec. 8. Be it further enacted that whenever the said tracks shall be placed on the roads the same shall be laid with such rails and in such manner as shall not obstruct carriage travel, and said company shall cause said tracks to conform to the grade of the roads as they now are, or as it may be by them, and at their expense, changed or altered, and said company shall keep the surface of such roads, inside the rails, and for two feet outside, on each side thereof, in good order and repair.

"Sec. 9. Be it further enacted that the act entitled 'An act to incorporate the People's Passenger Railroad of the city of Memphis,' passed February, 1860, be, and the same is hereby, repeated, together with all acts and parts of acts inconsistent with this act.

"Sec. 10. Be it further enacted that this act shall take effect from the date of its passage.

[Signed] "William Heiskell, Speaker of the House of Representatives.

[Signed] "Samuel P. Rodgers, Speaker of the Senate.

"Passed June 7, 1865."

AMENDMENT TO CHARTER.

Being twenty-fifth section of an act entitled 'An act to incorporate the Dandridge Railroad Company.'

"Sec. 25. Be it further enacted that the Memphis City Railroad Company, chartered June 7, 1865, is hereby authorized to exercise and enjoy all the rights, privileges, and franchises granted to any other street-railroad company in their charters for the city of Memphis or Shelby county, and that this act shall take effect from and after its passage

"Passed March 9, 1867."

Under the foregoing amendment, the company have the rights and privileges contained in the following :

CHARTER OF THE CITIZENS' STREET-RAILROAD COMPANY.

"SEC. 4. Be it further enacted that R. Hough, J. E. Merri-
man, P. G. Woods, S. B. Beaumont, A. F. Kelsey, Spense
Woods, Ross Griffin, be, and the same are hereby, incorpo-
rated a body politic, under the name and style of the Citi-
zens' Street-railroad Company of Shelby county, state of
Tennessee, and may sue and be sued, plead and be im-
pleaded, have and use a common seal, buy, hold, and sell
real estate, and enjoy all the rights and privileges usual to
such corporations, for a period of fifty years.

"SEC. 5. The capital stock of said company shall be two
hundred and fifty thousand dollars, divided into shares of
one hundred dollars each; but said company shall have
power to increase said capital stock from time to time, by a
majority vote of the board of directors, to one million dollars;
and said stock shall be transferable on the books of said com-
pany under such rules as the board of directors may enact.

"SEC. 6. Said company is hereby authorized to construct
and run their railroad on any of the streets or highways of
Shelby county, and are authorized and empowered to charge
and collect from each passenger a sum not to exceed ten
cents.

"SEC. 7. The corporators named in section 1 may open
books for subscription to the capital stock; and, whenever
there is subscribed fifty thousand dollars, said stockholders
may proceed to elect a board of five directors from their
number, and said board of directors shall elect from their
own number a president, and such other officers as the board
may, by their by-laws, designate.

"SEC. 8. Said company is hereby authorized to connect
with, and run their cars on and over any track of, other street-

railroad companies in the city of Memphis, by the payment of a reasonable amount for such privilege, and collect fare from each passenger in an amount not to exceed ten cents, as provided in section 6 of this act."

"Passed May 23, 1866."

Next we have what I shall call the "Street-railroad Charters Act" (Mill. & V. Code, § 1920 *et seq.*).

"1920. The form of a charter for a street-railroad shall be as follows :

"STATE OF TENNESSEE. CHARTER OF INCORPORATION.

"Be it known that [here copy the names of five or more incorporators not under the age of twenty-one years] are hereby constituted a body politic and corporate by the name and style of [here insert the name], for the purpose of constructing a street-railroad in the incorporated town of [here insert the name of the town], commencing at [here insert the initial terminus] and ending at [here insert the terminus and the general route of the road].

"1921. The general powers, etc., of said incorporators are [here insert the powers as declared in sections 1704, 1705]. The said company is authorized to consummate any contract with the city authorities of the town aforesaid, or with the county court, if the route extends, or is to be extended, beyond the limits of said incorporated city, or with private individuals, necessary to get the right of way along the public streets of the city, or along the public roads of the county ; provided, that no one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done ; or, if the said road extend into the country, the consent of the county court must be first obtained.

"1922. The company may operate said street-railroad by animal power, or may use a dummy steam-engine ; provided, said engine shall not give off either smoke or steam so as to annoy or frighten either persons or animals. The company is at liberty to choose the gauge of the road, and the railroad-track, cars, and coaches shall be used only for the transportation of passengers and personal baggage at a uniform price per head, which, for person and baggage, shall not exceed ten cents, or the fractional part thereof, from one to the other terminus of the road. In the construction of said road a tram-rail only shall be used, and of such a description as to obviate danger of injuring wheels or axles of vehicles passing along and crossing said railroad-tracks.

"1923. The company may issue bonds payable in such amount, at such times and places, as it deems best, with coupons attached for payment of interest, and may dispose of the same to raise money to construct or repair the road, and, to secure payment of the same, may mortgage the property, real and personal, and also the franchises, of the company.

"1924. Vehicles shall, at a proper signal, yield the right of way over the track and switches of said railroad to the passing cars, within a reasonable time; and it shall not be lawful to obstruct the free passage of the cars on said road, and any wilful obstruction by any person shall be a misdemeanor. Priority of possession of the track is always to be given to fire-engines and apparatus.

"1925. The powers herein granted are in no manner to interfere with the rights of private citizens or private property. The power is especially reserved to the incorporated city aforesaid to regulate the position of the switches or tunnels of said railroad in such manner as not to interfere with public travel through the streets; or, if the road is extended into the country, similar right is reserved to the county court."

Observe the differences between these two schemes of street-railroad corporations. Although there are many features alike, as to that which is granted each is separate and independent. The one is special, wholly, and would be impossible under the present constitution. The other conforms exactly, as a general law, to that instrument, and is, in my opinion, the only way that any new street-railway corporation can now be created. Other general laws, embodying a different scheme, might be made, and proposed incorporators might have a choice; but no law could be made especially for a class, no matter how that class arises,—whether by growth out of old corporations, or in any other way,—and any scheme, no matter what, which should take up the old corporations, and by any general law, no matter what its nature might be, undertake to make a special class, with general laws for its organization and powers, would be unconstitutional, under the new constitution, unless it does what I think it does—permits the legislature to keep alive the old charters, supported by the old constitution, as to the vital parts of new companies organized for the very purpose of being clothed with these old charters. The point is worth noting again that if the state and these two old companies had intended, by their agreement for a reorganization, to do what the city insists was done, there was no need for any new legislation, and the new corporation should have been, and must have been, organized under this street-railroad charter act.

The necessity for, or the existence of, any other general laws, shows that some other kind of scheme or contrivance was essential. The one comprehends the "organization" of corporations "hereafter created;" the other, the reorganization of corporations already created, under more extensive powers of legislation than now exist. Organization and reorganization are different in every essential particular, and the same consequences do not necessarily follow in both. Now, then, we have, for the purposes of reorganization, another general law, subject to alteration and repeal, to be sure, but not from that fact alone destructive of the old charters. This destruction must come from some direct blow given, with the deadly intention of destruction, and not as a result of provisions for reorganization, which naturally and ordinarily imply conservation, and not destruction. I shall call the general law the "Railroad Consolidation Act," and we find it in Milliken & Vertrees' Code, at section 1263 *et seq.*; and note especially section 1268:

"ARTICLE 111.

"Of the consolidation of railroads.

"1263. Every railroad corporation existing in this state under a general or special law, or under a general or special law of any other state ratified by this state, and having authority to operate and maintain a railroad in this state, shall have power to consolidate itself with any other railroad corporation whose road shall connect with, or intersect the road of, such existing railroad corporation, or any branch thereof. [Consolidations previous to March 12, 1875,—the date of the passage of the act,—were also ratified and confirmed by the act, provided all indebtedness existing at the date of such consolidation should be paid within sixty days from the passing of the act. 1875, c. 51, § 1.]

"1264. The agreement of consolidation shall be in writing, and shall set forth the corporate name agreed upon, and the terms and conditions of the consolidation.

"1265. The consolidation shall not have effect until the terms and conditions of the agreement shall have been approved by a majority of stockholders of each of the consolidating companies at a regular annual meeting. [This act also provides that the consolidation shall not take effect until such companies shall have paid all indebtedness due to the state for bonds issued to aid in the construction of the road. 1871, c. 69, § 2; 1877, c. 72, § 2.]

"1266. The agreement, together with the evidence of the

stockholders' approval, shall be filed and recorded in the office of the secretary of state.

"1267. The rights of creditors of the consolidating companies shall in no wise be affected or impaired by such consolidation.

"1268. The corporation formed by the consolidation of two or more railroad corporations shall have all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, not inconsistent with the provisions of this article, conferred and imposed by the laws of this state upon such companies so consolidating, or either of them.

"1269. It shall have power (1) to fix the number of its directors, and the time of their election; (2) to fix the number, names, and duties of its officers; (3) to pass by-laws for the government of the company and the management of its affairs; (4) to fix the amount of its capital stock, which shall be divided into shares of \$100 each; (5) to issue bonds, and dispose of same, in such form and denomination, and bearing such interest, as the board of directors may determine, and to secure the payment thereof by mortgage of every and all, the property and franchises of said consolidated company, and of the companies from which it was formed; (6) and to do all other acts and things which the said companies so consolidating, or either of them, might have done previous to such consolidation.

"1270. No exemption from taxation of railroad property and franchises, and capital stock therein, contained in railway charters or other railway laws of this state, shall be transferred to, or conferred upon, such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto, and used in the operation thereof.

"1271. No railroad company shall have power to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees, and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state. [See section 1251.]

"1272. The state shall have the power by appropriate legislation to prevent unjust discriminations against, and extortions for, freights and passage over all railroads in this state."

The act of 1867-68, c. 72, § 1, provided that no railroads should be consolidated without the consent of three fourths of the stockholders. The act did not confer the power to consolidate, but merely prescribed the manner in which the power, being assumed to exist, should be exercised.

By the very terms of this act, it is preservative and not destructive. The consolidated company shall have all the rights, powers, privileges, immunities, and franchises conferred and imposed by the laws of this state upon such companies so consolidating, or either of them. The plaintiff company finds its muniment of title for its creation and powers in the laws of this state passed in 1865 and 1866,—its old charters, namely,—and not in this section (1268) of the railroad consolidation act. It finds that title, and all its other belongings, preserved to it, and some additional grants, perhaps, in this railroad consolidation act; but one had as well say that a substance chemically preserved in alcohol is created by the alcohol as to say that this plaintiff is created by this consolidation act. It is the same old creation in a new form, and was, beneficially to the public and the companies, presumably, in the wisdom of the legislature, intended to be preserved for the very purpose of continuing intact all its specially granted privileges, the more valuable now, and the more necessary to be preserved, because they are special, and can be no longer created anew, as special grants. This was, in my opinion, the sole purpose of this act. It was applied by the act of March 26, 1887, c. 189, to street railroad companies as follows:

“CHAPTER 189.

“An act to extend section 1263, and the sections following, down to and including section 1272, of the Acts of Tennessee, as compiled by Milliken & Vertrees, to street-railroad companies.

“Section 1. Be it enacted by the general assembly of the state of Tennessee that the provisions for the consolidation of railroads contained in section 1263, and the sections following, down to and including section 1272, of the Acts of Tennessee, compiled by Milliken & Vertrees,—said acts referred to in the caption,—be hereby declared to embrace and extend to any street-railroad corporations existing in this state, and to give every such street-railroad corporation the power to consolidate itself with any other such street-railroad corporation, where the road shall connect with or intersect the road of such a street-railroad corporation, or any branch thereof, in accordance with said sections; provided, that nothing in this act shall be construed to renew or extend the charter of either of said street-car companies in favor either of the original or consolidated company; and provided, further, that nothing in this act shall be taken or construed to have any effect whatsoever upon any litigation now pending between the state and either of said street-car companies, or between the municipality

in which the same is located and either of said companies ; provided, further, that nothing contained in this act shall be construed to in any way enlarge or control the rights that towns and cities now have by existing laws over their streets, alleys, or sidewalks, without their consent.

"Sec. 2. Be it further enacted that consolidations of such street-railroad companies made previous to the passage of this act are hereby ratified and confirmed to the extent of the provisions of the said sections of said Code.

"Sec. 3. Be it further enacted that this act take effect from and after its passage, the public welfare requiring it.

"Passed March 26, 1887."

This act adds nothing to, nor takes anything from, the other, and is quite unimportant to this controversy, although it has a somewhat curious phraseology in its provisos. These only more forcibly, it seems to me, indicate an intention to preserve, and not destroy ; to keep alive, and not to kill—the old charters, although they do also carefully abstain from enlarging or diminishing the powers and privileges beyond the bare necessities of preservation. But there is nothing here to show any intention of bringing the old charters under under the dominion of the legislature in the matter of altering or repealing those charters. This ends the legislation, and the argument upon it.

So far I have considered these laws without reference to the adjudications cited in the argument of counsel ; but I find no constitution like ours, and no case like this. Undoubtedly the supreme court has, in a large list of cases, often decided that by consolidation the old constituent companies have been destroyed, an entirely new corporation created, and the effect was to let in the new constitution, and restore to the state that dominion over its taxing power which had been lost by a charter contract of exemption. *Railroad Co. v. Berry*, 113 U. S. 465 ; *Railroad Co. v. Palmes*, 109 U. S. 244, 13 Am. & Eng. R. Cas. 380 ; *Railroad Co. v. Maine*, 96 U. S. 499 ; *Railroad Co. v. Georgia*, 98 U. S. 359. On the other hand, the same court has held that this result did not at all follow in certain other cases, where the old corporations and their charters remained in force for the preservation of their immunities, etc., against the effect of dissolution and consolidation. *Tomlinson v. Branch*, 15 Wall. 460 ; *Railroad Co. v. Georgia*, 92 U. S. 665. Other cases might be cited, but these two are sufficient. They both hold that it is a question, in every case, of the legislative intent, to be gathered from the circumstances in each case, as shown by the legislation under which the consolidation takes place ; and the former of the cases holds that the presumption is that the consolidated

company preserves the original charter rights and burdens intact, unless the contrary is expressed.

Counsel for the plaintiff, since the argument, by supplemental brief, has undertaken to maintain our federal jurisdiction under the fourteenth amendment, contending that it is not within the competency of the state to destroy its property by legislative act. Possibly it is a full answer to this to say that such a holding would utterly nullify the constitutional or special reservation in a charter, of the power to alter or repeal it. If it may not destroy by repealing, there might not be much value in the power to repeal, and possibly the effect would be that by the charter contract the incorporators submitted to this tremendous power. Possibly, again, there might be a constitutional obligation, if repeal did take place, to compensate the incorporators by paying the value of the property so destroyed; but that is another question, and not a federal question at all, since nothing in the federal constitution requires such compensation. But I do not care to express any opinion on this fourteenth amendment, in its relation to this case, because I find our jurisdiction amply supported by what has been already said of the contract obligation clause in its relation to the case.

Finally, on this question of our jurisdiction, it must be noticed that we do not now finally decide these questions, or any of them, but only provisionally, for the purpose of this application for a preliminary injunction; and however they may be finally decided, whether in accordance with the views here expressed, or contrary to them, it is sufficient to say that the case fairly presents a federal question in presenting these for decision. I have no longer any doubt about our jurisdiction of this controversy, and this brings us to the question of its merits, which can be very briefly disposed of upon perfectly familiar principles.

That the plaintiff company has, by grant from the state, a right to occupy and use, in its business, any street in Memphis, the use of which it has not abandoned or surrendered by contract or otherwise, and that at the time it was obstructed by the city it had the right to so use West Court street, now in controversy here, by such grant, admits of no doubt whatever. If I am correct in the views expressed as to the effect of the constitutional provisions and the legislation we have been considering, there is just a little doubt that neither the state nor the city, acting under any delegated authority from the state, could take away this right of using West Court street by forbidding the plaintiff company to construct its tracks, as was done by the city. All acts of the legislature

General control of street railways—Municipal usurpation of state power.

or municipal ordinances authorizing, directly or indirectly, such a prohibition, would be null and void, as against the federal constitution, which forbids such an impairment of its charter contract to construct, maintain, use, and operate street railways "on all or any of the streets in the city of Memphis." If the city charter confers this power of prohibition, it is to that extent void; if the municipal council assumes the power, and passes an ordinance authorizing the prohibition, as it did on the facts of this case, that ordinance is void; and if, under the municipal charter or the ordinances of the city, the municipal authorities assumed the power of prohibition as one belonging to their police control, such authority would be likewise void.

The city has by its ancient and modern charters, to be sure, the right to regulate and control this use by the street-car company of the city streets. The franchises were granted subject to that power. And this would have been so without any special grant of the power of regulation to the city, and that power, in its more plenary quality, entered into the charter contract with the company, and became a part of it. Under it the city may, by ordinance,—possibly by contract, or both, and possibly without either,—under mere police oversight, regulate and control this use of the street in a thousand ways, such as determining the kind of tracks, their location in the street, their connections, and the like; the running of the cars, and the like; the joint or simultaneous use by other street railway or transportation companies, and the like; the use by others, such as water and gas companies, at the same time; the relation of abutting owners to the use; and, indeed, all matters falling reasonably within the police power of regulation and control. But regulation cannot be enlarged into a power of prohibition, nor under it can the city usurp the state power of creating franchises or taking them away. If it has such power of creation or withdrawal, independently of the power of regulation and control, the grant of it is, as to this plaintiff company, null and void. The plaintiff company can be deprived of its right to use any or all the streets only by its own consent, express or implied; and we come now to that feature of this controversy, and it is of easy solution.

It is contended that the street-car company has abandoned the use of West Court street, upon the facts of this case. It is decided nowhere so well as by our own supreme court that, "to constitute an abandonment or waiver, there must be a clear, unequivocal, and decisive act of the party, showing a determination not to have the benefit in question, with full

Abandonment
of right to use
street—Clear
intention must
appear.

knowledge of his rights in the premises." Meigs, Dig. tit. 'Abandonment.' Breedlove v. Stump, 3 Yerg. 257; Gentry v. Gentry, 1 Sneed, 87; Traynor v. Johnson, 1 Head, 52; Masson v. Anderson, 3 Baxt. 290. Tested by this rule, there is not an unequivocal act of the plaintiff company shown by this record in my judgment. Moreover, there is one fact which makes these acts, each and every one of them, perhaps less clear, more equivocal and altogether indecisive of any intentional abandonment than any of them would be without that fact—the two years contract, namely. By this the company had two years to re-establish itself upon the streets with electrical power instead of animal power, and West Court street was one of those included in the contract. Until those two years shall expire, any fact relied on to show abandonment should be more clear, unequivocal, and decisive than otherwise might be required, because the parties have fixed that time to determine what state of mind the plaintiff shall take in the matter of occupation and re-establishment upon that and all other streets. If it were possible to speak into existence such an establishment, the street-car company might have delayed all action until the last day, and the last minute of the day, and then saved itself by speaking the words to create the change from animal to electric power before the two years expired. The delay could not have been treated as evidence of abandonment if actual occupation should come, however late, within the two years. This is what the limitation as to time meant, and it is by contract the street-car company has two full years within which to make up its mind finally; and it might in the mean time change its mind as often as it chose, so long as, by some decisive act, it did not surrender the street, such as a specific consent to leave the street, expressly manifested for that purpose. That would be abandonment, understandingly, by clear, unequivocal, and decisive action. Scarcely anything less would be evidence of it, owing to this very limitation of time.

The fact that the company had, before the change from animals to electricity, made only a limited use of West Court street, as a spur track for temporary stoppage of cars, turntable uses, and the like, does not preclude it now from extending that use to the full extent of its inviolable grant from the state at any time within the two years allowed for the purpose under the contract with the city. It was a concession to the city to impose this limitation of time upon itself, and in that light its conduct will be most favorably construed for itself on this question of abandonment and finality of decision. Finality will not be imposed earlier than the time at which the two years expire, when, but for this concession,

longer time might reasonably have been claimed before any implications based on lapse of time should be drawn against it in a question of abandonment. Similarly, the fact that this spur and turntable use was abandoned for a turnout contrivance higher up town, and on Main street, itself does not show unequivocal abandonment of all use of West Court street. It might tend to show—somewhat feebly, perhaps—abandonment of that street for turntable and turnout uses; but, as both the Main street contrivance and the West Court street contrivance might both be useful for that purpose, it would hardly come up to the rule of unequivocal manifestation, even of that limited abandonment. Surely it does not manifest abandonment of the more important and larger use now proposed, of making a loop track, for the convenience of a change of direction of travel, and the concentration of terminal facilities for taking on and letting off the travellers.

So of the fact that, in the process of construction of the tracks on Main street, West Court street was passed, and no provision made at their junction for a track into West Court street, as was done at the junction of Jefferson street and other streets; all this is equivocal, at least. Jefferson is a long street, containing an extensive route of travel; West Court, a very short street—only two or three hundred feet—not adapted, by itself, for a route of travel, like Jefferson street, but well adapted for a loop-track, such as is now proposed, or a turnout-track, such as was there before. The company may not have made up its mind to put in a loop-track when it reached West Court street, nor whether it wished to put in turnout contrivances, nor whether it wished to go down to the river, or the like; but nothing in this contract required it to make up its mind as to these things when it reached West Court street, but it had two years for that purpose—two entirely different limitations as to time; the one imposed by contract, the other not at all. If Main street, in its adjacent parts was constructed, as to tracks, pavements, etc., without reference to a possible change of mind within the two years allowed for that purpose, the only result is that it will cost the company more to construct on West Court street than it might have cost otherwise. This may show bad business management; but it does not show abandonment of the right to use West Court street for any purpose within the original grant, and its supplements, at any time within the two years.

So, too, as to the bonds deposited as collateral security to enforce the completion of the system and a compliance with the contract. Naturally the company would desire to recover the bonds at the earliest possible moment. Naturally, too,

the city might be generously inclined to give them up as soon as possible. Under this impulse either or both may have disregarded the non-occupation and incompleteness of construction as to West Court street; and in a matter so small as that, in relation to the vast establishment, which had been so speedily constructed, the disregard would have been quite immaterial and harmless. This possibility makes the act equivocal, to say the least, on the question of abandonment. Again, it is so in view of a possibility that the company concealed its purpose to occupy West Court later on just to get back the bonds earlier. This would have been immoral, perhaps, but not a surrender of West Court street. Neither would such surrender be imposed as a penalty for the immorality. The city might have compelled the restoration of the bonds, or had a suit for damages, or the like; but it could not enforce fair dealing in this behalf by a penalty of abandonment of all occupation of West Court street. To say the very least, the act appears equivocal and indecisive in this view. Again, the contract gave two years for its completion, and did not contain any limitation that the time should be shortened by the occurrence of any demand for the collateral bonds. It was the business of the city to keep the bonds for two years, until the contract was fully performed; and the act of the city in their surrender cannot be made to operate as evidence of abandonment by the company. The company's acceptance of the bonds, which all men do readily, could not be converted into an act of abandonment of the streets not completed in their occupation. It is not a fitting deduction from the act, unaccompanied by any express purpose of that kind, or inquiry as to West Court street by the city. The city should, in fairness, have asked the question if West Court street had been abandoned before surrendering the bonds, and not taking it for granted upon an implication based upon a demand for them by the company. Not doing this, it cannot predicate of the act a clear, unequivocal, and decisive abandonment by the company, understandingly made, of the right to use that street under its charter, for that is the source of the right, and not the grace or favor of the city; and this question is not to be determined as if it were by such grace or favor that the streets are used by this company, however it may be as to others.

Altogether, I think there is no evidence of abandonment, and the injunction will be granted, but upon a bond of \$25,000, with the usual condition to pay such damages as the city may sustain by the wrongful suing out of this injunction, and an additional condition that it will surrender the street, if this suit be finally decided against the plaintiff, and the injunction

dissolved, in the same condition as it was at the beginning of the occupation, free of all cost or expense to the city. Injunction granted.

Street Railways—Municipal Control—Franchises.—*Quo Warranto*.—In *People v. Fort Wayne & E. R. Co.*, 92 Mich., 522, it was held that, where a city has control of its streets, and the common council passes an ordinance authorizing the construction of a street railway, *quo warranto* to prevent the company from laying its tracks will not lie against the railroad company. In this case the court said: "The right being such a one as the common council had a right to grant, and the common council having assumed to grant the right, the case presented is not such a one as calls for the exercise of the jurisdiction of this court in a public proceeding instituted by *quo warranto*. The question presented is similar to that involved in *Maybury v. Gas-light Co.*, 38 Mich. 154. In that case it was sought by *quo warranto* to deprive the respondent of its franchises, on the ground that the company had violated the terms of the agreement upon which the assent of the city to the use of its privileges was granted. Chief Justice CAMPBELL, in delivering the opinion of the court, said: 'In the present case the state has shown by the incorporating act that public policy is not opposed to and is in favor of allowing gas companies to exist, as they only can exist, by having power to lay their pipes. The consent of the municipal corporation is required because the terms on which streets may be safely allowed to be occupied for the purposes of laying gas-pipes can best be determined by leaving the regulation to be harmonized with all other exigencies by the authorities controlling their use. * * * The exercise of the power of using streets for laying gas-pipes is rather an easement than a franchise. * * * It is a matter peculiarly local in its character, and which should always be to a reasonable extent under municipal supervision to prevent clashing among the many convenient uses to which ways must necessarily be subjected, for water, drainage, and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a state franchise, but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license, and in nothing else. A violation of the contract, or an unauthorized intrusion, must be redressed, as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the state whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. * * * This court has heretofore refused to recognize the encroachment of a corporation on a highway as subject to be reached by *quo warranto*, and we discover no better reason for interfering in the present case.' Relator's counsel rely upon *Coon v. Plank-road Co.*, 31 Mich. 178, and *Mayor v. Park Com'rs*, 44 Mich. 602. The case of *Coon v. Plank-road Co.* was a case involving a forfeiture of a franchise, and not a case for private redress. *Mayor v. Park Com'rs* was a proceeding against public officers to inquire into the exercise of a franchise in the matter of controlling and supervising a public park, and is not analogous. What was said upon this subject in *Railway Co. v. Mills*, 85 Mich. 647, 648, 46 Am. & Eng. R. Cas. 608, was unnecessary to the determination of the case, and should be limited at least in its application to a case where the right attempted to be exercised is one which the local authorities have not power to confer, which is not the case here."

Rebuilding—Restraint by Injunction.—In *City of Trenton v. Trenton Pass. Co. R. Co.* (N. J., Sept. 14, 1893.), 27 Atl. Rep. 488, it was held, under the charter of the City of Trenton, which gives the city council authority

to determine the manner in which corporations shall exercise any privilege granted them in the use of any street that a street-railway company might be enjoined from rebuilding its road without the consent of the board of public works, which had succeeded to the powers of the council of the city.

Grant of Franchise—Reservation of Right to Impose Further Conditions.—In *City of Detroit v. Fort Wayne & B. I. R. Co.*, 93 Mich. 456, it was held that a reservation in an ordinance granting a franchise of the right to impose further conditions involved the right to provide for enforcement of such conditions by a fine. The court said: "While it is true that ordinances of this class have been held to partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. The power to enact an ordinance involves all the incidents necessary to give effect thereto. The charter of the city of Detroit (section 142) empowers the common council to punish the violation of any ordinance by imposing a fine. Irrespective of this express authority, a municipality has an implied power to provide for the enforcement of its ordinances by reasonable and proper fines. 1 Dill. Mun. Corp. § 338. The reservation in an ordinance to impose further conditions involves the right to provide for the enforcement of such conditions in the manner provided by law. The application of the rule contended for to this class of cases would prevent this method of enforcement of any condition imposed by virtue of the reservation of this character. The common council having the power to impose the condition in question by ordinance, it has, as incident thereto, the power to provide for its enforcement. The general rule above stated must be held to apply only to regulations, the authority to enact which depends solely upon the exercise of police powers, and not to conditions imposed by an ordinance, enacted by virtue of a reservation in a by-law, which partakes of the character of a contract."

Estoppel of City from Denying Validity of Franchise—Implied Acquiescence.—In *Spokane St. R. Co. v. City of Spokane Falls* (Wash., June 20, 1893.), 33 Pac. Rep. 1072, it was held that the city was estopped from claiming that it had not authorized the street-railway company to maintain a track on a particular street, where it appeared that the railroad company, with authority under an ordinance to lay its track on certain streets, laid part of it on the street in question, which was not mentioned in the ordinance, with the full knowledge of all the city officials and without objection, and under the directions of the street superintendent, and operated its line over the said street for more than two years without objection, paying during that time the taxes levied on its property in such streets. In this case the court said: "It is a rule that obstructions of this kind acquire no legality from the fact that they are put in place and operated without interference, and that mere time does not cure their illegal character; but in the case of a quasi-public institution, like a railroad or street railroad, there are some exceptions to this rule. A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority. In this case the appellant had authority by ordinance to lay down a street railroad upon a number of streets. It mistook its rights, and placed a part of its track in a place not designated in the ordinance. Technically, it had no right to put its track where it did; but the complaint shows that the municipal officers, from the mayor down and including the superintendent of streets, knew that the track was being laid on Division street, and no objection was made, and the superintendent of streets himself directed the method of laying the track upon that street. Subsequently, the road was put in operation, and continued to be used for

upward of two years, during which time the corporation made no objection, and from year to year levied and collected taxes upon this very property, and up to this time, so far as the complaint shows, no objection has been made to the operation of a street railroad upon Division street. The only inference which has been undertaken is not one for the purpose of clearing the street of an obstruction, but one to enable another street-railroad company to lay down and maintain a track in the same place. There are two cases which seem to sustain the view that such circumstances would estop a city from claiming that the right to maintain a street railroad on Division street was not properly authorized by it. See *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25; *Chicago & N. W. Ry. Co. v. People*, 91 Ill. 251. It may be said that the time which had elapsed in those cases was far greater than in this case, but it will be noticed that in both the payment of taxes was a ground upon which the estoppel was held to apply. The assessment of taxes is a deliberate and formal matter, and there is no reason why an estoppel should not grow out of one assessment as well as many."

Abatement of Railway as Public Nuisance.—In *Spokane St. R. Co. v. City of Spokane Falls* (Wash., June 20, 1898.), 33 Pac. Rep. 1072, it was held that, though a city might by a general ordinance, under a charter provision authorizing it to cause the abatement of nuisances, abate an unauthorized street railway without proceedings in court, it could not do so under a mere resolution aimed at a particular railway. The court said: "The charter of the city of Spokane (section 14) authorized it 'to cause any nuisance to be abated.' It may be conceded that this clause of the charter would permit the tearing up of street-railroad track in the manner adopted in this case if the city had put itself in a position to do so. It was held by this court in *Baxter v. City of Seattle*, 3 Wash. St. 352, that the provisions authorizing a city to prohibit the erection within any prescribed limits of any building constructed of other materials than brick, mortar, stone, and iron, and to provide for the removal of the same, were sufficient to justify a general ordinance prohibiting the erection of such buildings, and to authorize their summary removal by the street commissioner, under the direction of the council. But in that case there was an ordinance declaring such structures to be nuisances, and that they might be thus removed. But in this case, so far as the complaint shows, there appears to have been no ordinance at all. The city had not acted in the matter. There was a resolution passed by the council, but that resolution was a mere special direction in this particular case. The law contemplates that in all such cases there shall be a general ordinance which shall be a law of the city, which it is bound to follow, as much as the people are bound to obey. In the absence of an ordinance regulating such matters, the city should have resorted to legal proceedings, and not taken in its own hands, by force, the execution of the decree against a party who had no legal notice of the pendency of the matter. It is very questionable whether, in any such case where there is a doubt as to whether or not there may not be existing rights in the person whose property is sought to be destroyed, the municipal corporation should proceed with its destruction without resort to a tribunal which may determine the right of the matter. This was the course taken in *Moore v. Walla Walla*, 2 Wash. T. 184. While a well-constructed street railroad may be a technical nuisance, if unauthorized, it is not dangerous to either life, health or property; and, so long as the courts are open to the determination of such controversies, there is no call for any violence or manner of arbitrary or oppressive action."

CITIZENS' STREET R. Co.

v.

CITY R. Co.

(U. S. Circuit Court, D. Indiana, July 11, 1898, 56 Fed. Rep. 746.)

Contract between City and Street Railway Company—Protection of Federal Constitution.—Valid city ordinances granting to a company the right to build and operate street-railway lines, and providing that the said city shall not grant to any other person or corporation any privilege which may impair the rights of the said company, constitute a contract protected by the constitution of the United States forbidding states to make any law impairing the obligation of contracts; and where the said company, relying upon the good faith of the city, has accepted the provisions of the ordinances and expended large sums of money upon its works, the federal court has jurisdiction of a bill in equity to prevent the said city from granting to another corporation the right to build and operate lines of railway, interfering with the rights granted to the former company.

Federal Guaranty not Read into State Statute so as to Render Ordinance Void—Federal Jurisdiction.—If the law of a state or a municipal grant under state authority is a valid enactment, except for its repugnancy to the constitutional provision prohibiting a state from passing any law impairing the obligation of contracts, such repugnancy presents a federal question and gives the circuit court jurisdiction, notwithstanding the federal prohibitions were attempted to be read into the state statute so as to make the acts of the city *ultra vires*.

Sufficiency of Complaint—Federal Jurisdiction.—A bill in equity alleging that the complainant made a valid contract with a city, by which it was authorized to build and operate its railway lines on all the streets of the city; that the complainant has expended large sums of money in building and equipping its lines; that it has fully performed all the duties and obligations imposed upon it by the city ordinances; that the city provided by ordinance that it would not grant to any other person or corporation any privilege impairing the rights of the complainant; that the common council of the said city did by ordinance contract with the defendant railway company for the construction and operation of railway lines which would substantially destroy the franchises granted to the complainant; that the said defendant railway company cannot build and operate its railway without interfering with and substantially destroying complainant's lines,—exhibits a cause of action arising under the constitution of the United States.

Miller, Winter & Elam and Benjamin Harrison, for complainant.

A. C. Harris and Elliott & Elliott, for defendant.

BAKER, J.—The question presented for decision arises on the motion of defendant to dismiss the bill of complaint on the

ground that the cause of action is one over which the Circuit Court of the United States has no rightful original jurisdiction. The parties to the bill are corporations organized and existing under the laws of the state of Indiana, and citizens thereof. The jurisdiction of the court to entertain this bill is bottomed on the question whether or not the cause is one arising under the constitution of the United States. Article 3, § 2, cl. 1, of the constitution of the United States provides that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." The words "shall extend," in this clause, are used in an imperative sense, and import an absolute grant of power. *Martin v. Hunter*, 1 Wheat. 304. The Congress has by appropriate legislation conferred on the Circuit Courts of the United States original cognizance of suits of a civil nature arising under the constitution or laws of the United States. The statute at present in force provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority." Act March 3, 1887, as re-enacted August 13, 1888 (25 Stat. 433).

The complainant derives its rights under ordinances of the city of Indianapolis, adopted, pursuant to law, in the years 1864, 1865, 1880, 1888, and 1889. The several ordinances are set out in full in the bill. By these ordinances the complainant is authorized to lay a single or double track for passenger railway lines on all the streets of the city, and on all extensions of the same, and to operate cars on such railway lines by animal power or electricity, and to receive certain tolls from passengers. The bill alleges that the complainant has constructed over 40 miles of railway lines on the streets of the city at an expense of more than \$1,000,000, and has equipped a suitable number of cars for use thereon, and has 40 miles of street railway in constant operation for the use of the public, and that it has fully performed all the duties and obligations imposed upon it by said several ordinances. It is expressly provided in the ordinance of 1864 that "the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein

granted to said company." It is shown that the rights, privileges, and franchises granted to complainant have not determined by efflux of time.

The bill alleges that on April 24, 1893, the common council of the city of Indianapolis, by an ordinance adopted by it, entered into a contract with the defendant, the City Railway Company, which will not only impair, Allegations of complaint. but will substantially destroy, the rights, privileges, and franchises granted to complainant. It is alleged that in pursuance of the ordinance and contract of April 24, 1893, the city, by its common council, in May, 1893, adopted an ordinance granting to the City Railway Company the right to lay, maintain, and operate its lines of street railway over and upon a large number of the streets now occupied by complainant, with single and double lines of railway tracks, on which it is constantly operating its cars. It is alleged that the City Railway Company cannot lay, maintain, and operate its lines of street railway without interfering with and substantially destroying complainant's lines of street railway, and impairing and destroying the rights, privileges, and franchises previously granted to it. Certain other ordinances are made parts of the bill, which, it is alleged, repeal and annul the ordinances granting rights and privileges to complainant because wholly inconsistent therewith. The complainant maintains that its bill exhibits a cause of action of a civil nature in equity, arising under the constitution of the United States, because its rights are secured by contract; and in disregard of that contract, under color of a law of the state, the city, by its board of public works and its common council, has granted to defendant rights, privileges, and franchises in derogation of the rights, privileges, and franchises previously granted to complainant. It is provided in article 1, § 10, of the constitution of the United States that "no state shall pass any law impairing the obligation of contracts."

Assuming the truth of the facts alleged in the bill, as we must, for the purpose of this motion, there can be no doubt that the rights, privileges, and franchises granted to the defendant impair the rights, privileges, and Impairment of contract. franchises previously granted to the complainant; nor is there any doubt that the grant of rights, privileges, and immunities to the complainant, coupled with its acceptance, and the expenditure of large sums of money on the faith thereof, constitute a contract protected by section 10 of article 1 of the constitution. So it was held in the case of *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 46 Am. & Eng. R. Cas. 176, in which the ordinances in question

were considered by the supreme court of the state, and were adjudged to constitute a contract between the city and the complainant. Since the decision in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it is no longer open to debate that where rights, privileges, and immunities are lawfully granted to and accepted by a private or *quasi*-public corporation, and money or its equivalent is expended on the faith of such grant, a binding contract is thereby created, whose violation by a law of the state is forbidden by section 10 of article 1 of the constitution of the United States.

It is contended by counsel for the defendant that, conceding that the grant of rights, privileges, and immunities to the complainant by the city constitutes a contract falling within the above constitutional guaranty, still it is not impaired by a law of the state, and, therefore, that no federal question is presented. When it is sought to invoke the original jurisdiction of this court on the ground that the suit involves in its determination a question arising under the constitution, laws, or treaties of the United States, it must be made to appear clearly and unmistakably from the complaint that the cause or controversy involves the consideration and determination of such federal question. That such federal question may possibly arise in the progress of the litigation is not sufficient. The complaint must disclose the existence of a federal question fairly presented for decision. If the complaint simply shows that, in the progress of the trial, some federal question may possibly be presented, it will be insufficient to confer jurisdiction. If, however, the complaint shows that a federal question is fairly presented, and that the consideration and determination of that question is involved, a cause of action is presented within the rightful jurisdiction of this court, even though other questions are involved whose decision are necessary to the determination of the rights of the parties.

The law of the state, under color of whose authority the city of Indianapolis, by its board of public works and its common council, is claimed to have granted rights, privileges, and immunities to the defendant in derogation of the rights, privileges, and immunities previously granted to the complainant, is found in the Acts of 1891, and is entitled "An act concerning the incorporation and government of cities having more than one hundred thousand population, according to the last preceding United States census, and matters connected therewith, and declaring an emergency." Sess. Laws 1891, pp. 137-197. Indianapolis is the only city in the state whose population brings it within purview of this act. All laws within the pur-

"State law"
within meaning
of constitution
—Municipal
ordinance.

view of this act and inconsistent therewith are expressly repealed. It is declared that an emergency exists for the immediate taking effect of the act from and after its passage, on March 6, 1891. From these considerations, the conclusion seems inevitable that the act in question was intended to operate as a charter for the government of Indianapolis alone. By this act the legislative authority of the city is vested in a common council. Comprehensive legislative powers are granted to the common council, embracing every subject of local and municipal concern. A board of public works is created, to be composed of three members, to be appointed by the mayor, and removable by him at pleasure, which is charged with the control of the public works and streets of the city. In section 59 of the act the duties and powers of this board are prescribed. Among them is the following: "To authorize and empower, by contract, telegraph, telephone, electric light, gas, water, steam, or street car or railroad companies to use any street, alley, or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use; to fix by contract the prices to be charged to patrons: provided, that such contract shall in all cases be submitted by said board to the common council of such city, and approved by them by ordinance before the same shall take effect."

The easement to occupy and enjoy the streets of the city for the purpose of constructing, maintaining, and operating a street-railway system thereon can alone be granted by the legislature. Without legislative grant, the use of the streets of the city for such a purpose would constitute a public nuisance. *Pettis v. Johnson*, 56 Ind. 139. And it is equally clear that, in the absence of a legislative grant of authority to it, the city cannot confer upon any person or corporation the right to lay, maintain, and operate a railway upon and along any public street or alley therein. "The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities." *WAITE, C.J., in Wright v. Nagel*, 101 U. S. 794. The authority exercised by the city in granting to the defendant the right, privilege, or easement to lay, maintain, and operate a street railway upon and along its public streets is that of the state itself. It is none the less a legislative grant by the state because the authority to make it is conferred upon a subordinate body, to which the legislature has delegated a portion of its powers. "If the authority exercised be that of the state itself, whether acting directly, through its legislature, or indirectly, through a subordinate body, to which the legislature has delegated a portion of its powers, it is competent for this court

to inquire whether it has exceeded its authority, and violated the constitution provision in question." *Saginaw Gas-light Co. v. City of Saginaw*, 28 Fed. Rep. 529, 16 Am. & Eng. Corp. Cas. 562.

In the case of *Weston v. City Council of Charleston*, 2 Pet. 462, a municipal ordinance of the city of Charleston, adopted under color of a law of the state, was held to be the exercise of an authority under the state of South Carolina, the validity of which might be drawn in question by the supreme court on the ground of its repugnancy to the constitution. The case of *Wright v. Nagle*, 101 U. S. 791, seems decisive of the question. The case was as follows: An inferior county court of Georgia was empowered by the statute of the state to authorize the establishment of such ferries and bridges as it might think necessary. It granted to one Miller the exclusive right of opening ferries and building bridges across the Oostanaula and Etowah rivers, at Rome, within certain specified limits. Miller afterward conveyed his rights and privileges to the plaintiffs, who expended large sums of money in building and maintaining the required bridges. Afterward the inferior county court authorized the defendants to erect and maintain a toll-bridge across the Etowah, within the limits of the original grant. The bill averred that the inferior court, "in the making and conferring of said franchise, exercised legislative powers conferred upon it by the laws of the state; that said grant is in the nature of a statute of the legislature; that the same is an infringement of the said grant and contract made by said inferior court to and with Miller, under whom plaintiffs hold, and impairs the obligation and validity thereof, and is repugnant to the constitution of the United States (article 1, § 10, par. 1), which prohibits a state from passing any law impairing the obligation of contracts." The court held that the authority to grant the franchise of establishing and maintaining a toll-bridge over a river where it crosses a public highway is vested solely in the legislature, and may be exercised by it directly, or be committed to such subordinate agency as it may select; and that the grant of such franchise by such subordinate agency was a grant by a law of the state, and its consonance with the above constitutional guaranty presented a federal question.

The case of *New Orleans Gas-light Co. v. Louisiana Light & Heat-producing & Manuf'g Co.*, 115 U. S. 650, holds that the grant of the right to supply gas to a municipality and its inhabitants through pipes and mains to be laid in the public streets is a grant of a franchise vested in the state, and that where the municipality, acting under legislative authority, grants such a franchise to a gas company, such municipal

grant is in the nature of a state law. To the same effect is the case of *Water-works Co. v. Rivers*, 115 U. S. 674, 10 Am. & Eng. Corp. Cas. 662.

The case of *Hamilton Gas-light & Coke Co. v. Hamilton City*, 146 U. S. 258, is urged upon the court by counsel for defendant as announcing a different doctrine. In this counsel are in error. The court held in this case that a municipal ordinance, not passed under legislative authority, is not a law of the state, within the constitutional prohibition against a state law impairing the obligation of contracts. The ground of the decision was that the ordinance there drawn in question was not a law of the state, for the reason that it was not passed under legislative authority. The implication is clear that, if the ordinance in question had been passed under legislative authority, it would have been held to be a state law, within the meaning of article 1, § 10, par. 1, of the constitution of the United States. To the same effect is the case of *Missouri v. Harris*, 144 U. S. 210. The case of *Shreveport v. Cole*, 129 U. S. 36, yields no support to the defendant's contention. Cole and another, citizens of Louisiana, sued the city of Shreveport, a corporation of the same state, in the Circuit Court of the United States for the western district of Louisiana. The case was, in effect, an action at law to recover a balance alleged to be due to the plaintiffs upon a contract with the defendant entered into in 1871. The jurisdiction of the court seems to have been rested upon the averments in plaintiffs' complaint that under article 209 of the state constitution of 1879, providing "that no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation," the city of Shreveport, being so situated as to need all the revenue from such a tax, could not raise funds to pay its just debts; that, therefore, plaintiffs are deprived by that article, "if same be valid and operative," of the remedy of enforcing payment by a levy of taxes; and that so said article impairs the obligation of their contract with the city. The court held that the constitution must be construed to operate prospectively only, in accordance with prior decisions of the state supreme court, and that, thus construed, it did not impair the contract of the plaintiffs. If, however, when properly construed, the constitution had conferred color of authority upon the city of Shreveport to refuse to levy a tax to discharge its contracts, manifestly the court would have held that the case presented a federal question, and that the circuit court had rightful original jurisdiction. The case simply decides that no federal question is involved where a law, properly construed, confers no authority upon a municipality to do the thing which is claimed to impair prior

contract rights. The converse must be true,—that a federal question is presented if, when properly construed, the law of the state does *prima facie* confer authority upon the municipality to grant rights and immunities which would impair prior contract rights, and such municipality, under color of such state law, has, in the manner provided, actually made such grant.

The act of 1891 expressly confers upon the city of Indianapolis the power by contract, when approved by ordinance of its common council, to grant to a street-car company the use of any street, alley, or public place in such city, and the right to erect necessary structures therein, and to prescribe the terms and conditions of such use, and to fix the prices to be charged to patrons. This statute vested the municipality with ample authority to make the grant to the defendant contained in the contract and ordinance of April 24, 1893. If the defendant has not acquired the rights and immunities granted to it in the above contract and ordinance, it is not because the statute does not expressly authorize the city of Indianapolis to grant them, but because such grant is in conflict with the constitutional provision which prohibits a state from passing any law impairing the obligation of contracts.

It is contended that the constitutional guaranty which prohibits a state from passing any law impairing the obligation of contracts must be read into the state statute; and, thus read, the statute would not confer any authority on the city to make the contract and enact the ordinance in question, and therefore no federal question would be involved. If such concession were granted, it is argued that no law of the state, however clearly it might impair the obligation of contracts, would present a federal question, because the bane and antidote would go together. If the constitutional prohibition was read into the state law, the federal question would still remain. The federal question in all such cases is, Does the statute of the state, or the grant made by a municipality thereunder, when fairly construed, and treating it as otherwise valid, present a case falling within the prohibition of the constitutional guaranty in question? If the law of the state, or a municipal grant under its authority, is a valid enactment, except for its repugnancy to the provision of the constitution which prohibits a state from passing any law impairing the obligation of contracts, then such repugnancy presents a federal question, and gives this court jurisdiction. Such a case is exhibited by the bill of complaint.

Let the motion to dismiss be overruled.

Reading federal guaranty into state law.

Street Railway—Franchise to Use Street—Exclusive Privilege.—In *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687, it was held that a franchise to use land for a right of way is, in its very nature, exclusive, so that the privileges and powers granted in respect to its use may be fully exercised; and dispossession of any portion of property subject to the use of a franchise in actual use is tantamount, in its legal effect, to the taking of the franchise *pro tanto*.

In *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687, it was held that the court will protect its receiver in the possession and proper use and management of the property and privileges, and franchises pertaining thereto, committed to him, and that the court will extend such protection even to restraining another railroad company from proceeding to condemn, or to subject to its use, property in the possession of its receiver, by proper legal proceedings, and will more readily do so when such condemnation or use is sought or attempted to be had without any legal proceedings being taken for that purpose.

Street Railway—Appropriation of Franchise by Another Company.—In *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687, it was held that one public corporation cannot take the franchises of another public corporation, in actual use by it, unless expressly authorized to do so by the legislature, and then only by proper legal proceedings of condemnation; and such taking must not materially diminish or impair the usefulness of a franchise in exercise.

Remedy—Duty of Court.—In *Germantown Pass. R. Co. v. Citizens' Pass. R. Co.*, 151 Pa. St. 138, it was held that the statute providing that whenever the rights of one corporation are alleged to have been interfered with by another claiming a right to do the act from which such injury results, it should be the duty of the court in which such proceedings are had, to ascertain whether such corporation does possess the right and franchise to do such injurious act, and if not, to restrain such injurious acts by injunction, enables a street-railway company to contest the interference of another in laying down tracks in a street already occupied by its own tracks.

In *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687, it was held that "the grant to the Mobile Street Railway Company, in its own nature, amounts to an extinguishment of the right of the grantors, and implies a contract not to reassert that right; and said railway company should be protected from impairment of its privileges and franchises under such grant by any attempt to appropriate or interfere with the same for the use of the Mobile Electric Railway Company; and if the use proposed to be made by the Mobile Electric Railway Company of the road-bed or track of the Mobile Street Railway Company obstructs, hinders, or embarrasses the use and usefulness of that part of the first acquired right which is in actual use by the receiver, it would be an illegal use, and should be prohibited."

Grant of Exclusive Privileges to Street Railway Companies.—See notes, 32 Am. & Eng. R. Cas. 216, 36 Am. & Eng. R. Cas. 116.

STERNBERG

v.

STATE

(Nebraska Supreme Court, March 1, 1898.)

Street Railroads—Municipal Control—Sale of Tickets on Cars.—The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets, 6 for 25 cents, to be kept for sale by each conductor of a street car. A street railway has no depots. Its stopping-places are on each street corner, and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public.

ERROR to Lancaster district court.

Marquett, Deweese & Hall and *W. G. Clark*, for plaintiff in error.

Geo. H. Hastings, Atty. Gen., N. Z. Snell, and Adams & Scott, for the state.

MAXWELL, C.J.—The plaintiff in error was convicted of assault and battery, and judgment rendered against him on the verdict. The case was submitted to the court below on the following stipulation of facts: "It is hereby stipulated and agreed that the Lincoln Street Railway Company is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, running and operating in the city of Lincoln a line of street railway, and that on the 31st day of July, 1891, William H. Sternberg was a conductor on one of the cars of said company, and on the 27th day of August, 1891, A. L. Rice was also a conductor on one of said company's cars. That on the 31st day of July, 1891, one George H. Bush got upon one of the cars of the said company, on which William H. Sternberg was conductor, and demanded of the said conductor that he sell to the said George H. Bush, 6 Lincoln street-railway tickets for 25 cents; and that the said George H. Bush offered to pay to the said William H. Sternberg, as conductor, the sum of 25 cents for said tickets; and that Mr. Bush demanded a package of six tickets for 25 cents, and manifested a willingness to pay one of the six tickets to the conductor whenever said tickets were delivered to him, and whenever said package of tickets was delivered to him he was ready to pay and deliver the 25 cents,

and for that purpose held the 25 cents in his hand, in full view; and that said Sternberg refused to give him a package of six tickets for 25 cents, but, on the contrary, demanded of said George H. Bush that he pay the 5 cents fare which was the customary charge for a single passage on the car; and that the said George H. Bush refused to pay the said 5 cents fare on said demand; and thereupon the said Sternberg notified him that he would have to leave said car, which the said Bush declined to do, and thereupon the said William H. Sternberg attempted to forcibly eject and evict said party from said car. The said Bush resisted, and the said Sternberg was unable by himself to put said party off, and thereupon called to his assistance other parties. That the said Sternberg and the parties he called to his assistance took hold of and laid their hands upon the said Bush, said Bush all the time resisting with all his power, and the said Sternberg and the persons helping him overcame said Bush's resistance, and forcibly ejected him from the car, said Sternberg and his assistants using, however, no more force than was necessary to overcome the resistance of Bush and put him off. That on the 27th day of August, 1891, A. L. Rice was a conductor on one of the cars of the said street-railway company, and that on the said date one Edwin P. Le Fevre got upon said car on which the said Rice was conductor to ride, and, when he was asked for his fare by the said conductor, the said Le Fevre demanded of the said A. L. Rice, conductor, that he sell to him six tickets for 25 cents, and the said E. P. Le Fevre was ready and willing and tendered to the said conductor the 25 cents for the tickets, and the said conductor refused to sell said tickets to the said E. P. Le Fevre, but demanded of him 5 cents, which was the customary fare charged by the said company for a passage upon its cars, and the said Le Fevre refused to pay the same, but insisted on being sold six tickets for 25 cents, out of which he would pay to the conductor his fare for said passage. The said A. L. Rice, as conductor, still refused to sell said tickets, and insisted upon the said Le Fevre paying the 5 cents fare, which Le Fevre refused to do, and thereupon A. L. Rice laid his hands upon the said Le Fevre, and forcibly evicted said Le Fevre from the car. That at both of said dates there was a rule and regulation made by said street-car company by which its conductors were required to eject and put off from its cars any person who attempted to ride without paying the customary fare. That on all the cars of the Lincoln Street Railway Company the fares are paid directly to the conductors, and not dropped into a cash-box, and, if the conductors are required to sell tickets, they would be obliged to handle the

cash fares, as well as those paid by tickets. That both the said E. P. Le Fevre and George H. Bush had ridden upon the said cars prior to these dates, and had attempted to buy six tickets for 25 cents from the conductors, and had been refused, and had been notified that said conductors did not sell tickets on the cars. That, prior to the putting on of the electric cars on the line of the street-railway company, all its lines had been operated by horse cars, and, under the system as operated by horse cars, there was only one man to the car, and he was the driver, and that all fares paid by the passengers on said cars were dropped into a cash-box, instead of being paid directly to the driver or conductor. That, under said system, it had been customary for several years for the driver on the horse cars to sell to passengers six tickets for 25 cents, as required by an ordinance of the city of Lincoln. That during the spring of 1891 said system of street cars changed from horse cars to electricity, and that, under said system, all the fares, both cash and otherwise, are paid directly to the conductor. That, under the present system of operating said street railway, the various railroad ticket agents in the city sell tickets 24 for \$1.00, instead of the conductor selling six for 25 cents to the passengers. That the number of people who ride upon the cars of the Lincoln street railway per day is upon an average about 7000, and about one half of these would buy tickets of the conductors, if six for 25 cents were sold by the conductor. That on said dates there was in force an ordinance of the city of Lincoln of the words and figures following: '1167. No company shall charge or receive more than 5 cents fare for each passenger carried on any of said roads, nor more than 25 cents for each package of six tickets. 1168. Every street-railroad company in this city shall keep for sale by the conductor or driver of each car packages of tickets of the required number for 25 cents each, ready for delivery during the running of the car to any passenger applying and paying for the same. * * * 1170. It shall be unlawful for any person to ride upon any street-railroad car in the city of Lincoln without paying the customary fare (unless exempt by the rules of the company owning said railroad). * * * 1172. Any person who shall violate any of the provisions of this article shall, upon conviction thereof, be fined in any sum not exceeding \$100, and be committed until such fine and prosecutions are paid.' On page 457 of the Municipal Code is an ordinance which provides as follows (referring to the Lincoln Street Railway Company): 'Said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances.'"

On the trial of the cause the court instructed the jury as follows: "The jury are instructed that the complaint charges that the defendant, on the 31st day of July, 1891, in the county of Lancaster and state of Nebraska, and within the corporate limits of the city of Lincoln, did unlawfully, in and upon one George H. Bush, make an assault, and did then and there unlawfully strike and wound him, the said George H. Bush. (2) The assault of the defendant upon the person of George H. Bush at the time and place alleged in the complaint is admitted by the defendant, and your verdict should be guilty as charged." The jury returned a verdict finding Sternberg guilty as charged, and he was fined \$5 and costs.

The defence is made by the street-railway company. The reasons set forth by it in its brief for holding the judgment erroneous are as follows: (1) The ordinance requiring the street-railway company to constitute its conductors agents for the sale of tickets was illegal and void (a) because such requirement is unreasonable in law, and in excess of the police power of the state; (b) because the council of the city of Lincoln was without power to enact such requirement. (2) Because the complaining witness was himself a wrong-doer, and voluntarily provoked and brought upon himself the alleged assault, and was in any event rightfully ejected from said car. (3) The ordinance is unreasonable, and exceeds the police power of the state. (4) The ordinance, which has no parallel in adjudged cases or in current history of municipal regulations, appears to have been suggested from the fact that at an early day, when the cars were operated by mules or horses, in charge of a single driver, the street-railway company, or, more exactly its predecessor, had sold tickets at the rate of six for 25 cents through the drivers. The drivers, however, were not permitted to take up such tickets, or to collect fares, which in each case the passenger must personally deposit in a fare-box. The driver was required to make change, when necessary, in a limited amount, but even then was not permitted to retain and deposit the fare. He returned the whole amount to the passenger, who dropped the fare into the box. Every one accustomed in those days to use the cars knows that this rule was rigidly enjoined and enforced, and that, even for the aged, or for women and children, the driver was unable on request to receive or deposit the fare. Under rapid (electrical) transit, and with increased numbers of passengers, public safety requires in most cases two men, instead of one, to manage the cars, and public convenience demands, whether reasonable or not, that the conductor collect the fares. These great improvements render the sale of tickets by conductors unsafe

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and impracticable. The stipulation shows that, a year ago, the street-railway company was carrying 7000 passengers daily, and that at least one half would in any event pay cash. The conductors then would receive \$175 in cash, and an equivalent of \$140 in tickets. These amounts are constantly increasing, because Lincoln is a growing city, and more persons use the cars each year. The opportunity for fraud and theft on the part of the conductor is manifest. A conductor on a crowded line might receive, and does receive, \$15 to \$30 daily. For half or two thirds of the cash taken, at the rate of 5 cents per fare, he can substitute tickets necessarily in his possession at the rate of 4 cents per fare, embezzling daily from 50 cents to \$2—\$15 to \$60 per month. The ratio of tickets to fares is necessarily uncertain and variable on different lines and dates. Detection, even by secret service, would be impossible, because a detective, to form a correct judgment, would watch so closely as to disclose his purpose."

The assertion that the ordinance in question is without a parallel in the current history of municipal regulations is not borne out by the cases cited. On the contrary, street railways are constructed for the convenience of the public. The cars necessarily pass over a certain prescribed portion of the streets occupied by their tracks. Every street corner is a station where passengers may be received and discharged. The streets are for the benefit of all the public generally, as well as the portion represented by the street-railway company. Now, as the company is permitted to use the public streets, and along their tracks have a right of way on which it is entitled to preference over other vehicles passing along the streets, it necessarily follows that the general regulations and control of such railways are under the police powers in the city government, and the municipality may enact all reasonable rules for that purpose. *Railway Co. v. Berry* (Ky.), 50 Am. & Eng. R. Cas. 434; *State v. Inhabitants of Trenton* (N. J. Sup.), 32 Am. & Eng. Corp. Cas. 445; *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 26 Am. & Eng. R. Cas. 534. It will be observed in the case at bar that on page 457 of Municipal Code of Lincoln it is provided that "said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances."

The constitution of 1875, to prevent favoritism and fraud, required the consent of a majority of the electors thereof of any city, town, or incorporated village to the construction of a street railway. Const. art. 13, § 2. This, therefore, was the proposition submitted to the electors, and accepted by them and the street-railway company. In addition to this, para-

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graph 18, § 67, art. 13 of the statute, grants the general power to regulate and prescribe the manner of running street cars, to require the heating and cleaning of the same, and to fix and determine the fare charged."

It is claimed on behalf of the company that the power "to fix and determine the fare charged" does not confer the power to require tickets to be sold at all, and therefore that no authority for that purpose exists in favor of the city. This is begging the question. The power to fix the rates of fare necessarily carries with it all incidents necessary to carry the power into effect. Thus, for a single passage the fare is 5 cents. If 6 trips are to be made, the price is fixed at 6 for 25 cents. A street railway has no depots. Its stations are the street corners, and its business with the public is conducted on its cars. Is it unreasonable to require the company to sell its tickets at its place of doing business? We think not. The plea that it is liable to be defrauded by its employes if it sells tickets on the cars, we believe, does injustice to many faithful, reliable, and diligent persons, whose integrity is above question, and is a mere pretext to evade the ordinance requiring tickets to be sold on the cars, as it will readily be seen from the stipulation of the facts that it is for the interest of the company not to sell tickets, but to collect fares in cash. But, even if the claim on behalf of the company is true—which we do not believe—it must comply with the ordinance. The question is one of power, and the power of the city over the street railway is full and ample, and the requirement is reasonable, and the company must perform on its part. Mr. Bush therefore had a right to demand six tickets of the plaintiff in error on offering to pay for the same, and the plaintiff in error was guilty of a wrong in ejecting him from the cars.

The judgment is right, and is affirmed. The other judges concur.

Right of Cities to Compel Sale of Tickets on Street Cars.—Shortly after the decision of the above case by the Supreme Court of Nebraska, the identical question was presented to the Supreme Court of Michigan, and the two courts reach the same conclusion. In *City of Detroit v. Fort Wayne & B. I. R. Co.*, 95 Mich. 456, it was held that an ordinance requiring a particular-street railroad company to sell tickets on its cars did not contravene the principle that ordinances shall be general in their nature and impartial in their operation. Commenting on the right of a municipality to impose conditions on street-railway companies, the court said: "The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only nec-

essary that the municipality keep within the scope of the reservation. In the recent case of *Sternberg v. State* (Neb.), *ante*, a similar ordinance was sustained under general provisions subjecting the company 'to all reasonable regulations in the construction and use of said railway which may be imposed by ordinance,' and empowering the municipality 'to fix and determine the fare charged.' The court held that the power to fix rates of fare necessarily carried with it all incidents necessary to carry the power into effect. 'A street railway has no depots. Its stations are the street corners, and its business with the public is conducted on its cars;' and that it was not unreasonable to require the company to sell its tickets at its place of doing business. In *Railway Co. v. Berry* (Ky.), 50 Am. & Eng. R. Cas. 484, it was held that an ordinance requiring a street-car company to put a driver and conductor on each car was a proper exercise of the city's police power, and not an impairment of the company's rights, not being unreasonable or oppressive."

HART

v.

BUCKNER *et al.*

(U. S. Circuit Court of Appeals, 5th Circuit, Dec. 19, 1892, 54 Fed. Rep. 925.)

Occupation of Street by Street Railways—Right of Abutting Owners to Prevent Invasion of Street—Parties.—Owners of lots abutting on or adjacent to a public street of a city, though not owners of a fee in the street, have the right of access and of quiet enjoyment, such rights being property which may be protected by injunction when invaded without legal authority; and where there is an unauthorized obstruction in the street, all the adjacent owners who sustain any special injury can maintain a suit for injunction against the party making the obstruction, and the alleged trespasser is the only necessary party defendant.

Same — Laches of Abutting Owners. — Where only one month and eight days elapsed between the time at which the franchise was sold and the institution by the abutting owners of the suit for injunction to restrain the alleged owner of the franchise from entering upon the street in question, and such abutting owners had entered a public protest against the granting of the said franchise by the city council, and the attempted invasion of the street took place after the commencement of the suit, there was no acquiescence in the acts of the alleged owner of the franchise on the part of the said abutting owners which would estop them from maintaining their legal rights.

Sale of Street Railway Franchise—"Highest Bidder"—Consideration.—Where a statute of the state required the sale of a street-railway franchise to be "to the highest bidder" at public auction, requiring a three months' advertisement of the purpose to sell the franchise, with particular specifications as to its scope, it must be taken to mean the highest bidder in money, and the sale of the franchise to the highest bidder "in square yards of gravel pavement" is invalid.

APPEAL from the Circuit Court of the United States for the eastern district of Louisiana.

In equity. Bill by Newton Buckner and others against Judah Hart to enjoin the construction of an electric trolley railway in front of complainants' premises.

By ordinance 5784, C. S., adopted November 17, 1891, the common council of the city of New Orleans ordained "that the comptroller give notice in a newspaper that he will, at public auction, in the council chamber, on the — day of —, 1891, at the hour of twelve o'clock meridian, sell to the highest bidder the right of way for twenty-five (25) years, for street-railway purposes, over the following streets, to wit: Commencing within 120 feet of the Canal-street ferry-landing; thence on the north side of Canal street, over the trunk-line of the Canal and Claiborne Street Railroad Company, to Carondelet street; along Carondelet street, over the track of the Crescent City Railroad Company, to Clio street; along Clio street to Constance street; along Constance street to Louisiana avenue; Louisiana avenue (north side) to Camp street; Camp street to Exposition boulevard (or lower side of Audubon park) and returning along Camp street to Henry Clay avenue street, Henry Clay avenue street to Coliseum street, Coliseum street to Louisiana avenue street (south side), Louisiana avenue street to Laurel street, Laurel street to St. Mary street, St. Mary street to Constance street, double track on Constance street to Calliope street, Calliope street to St. Charles street; thence down St. Charles street, over the track of the Crescent City Railroad Company, to Canal street; and thence along Canal street, using the trunk line of the Canal and Claiborne Railroad Company, to the starting-point at Canal-street ferry-landing. * * * All in accordance with map of said route and specifications in the office of the city engineer." In obedience to this ordinance, the comptroller published for three months, according to law, the following advertisement: "Public notice is hereby given that on Monday, March 28th, 1892, in the council chamber, at the city hall, at the hour of 12 o'clock m., will be sold at public auction to the highest responsible bidder the right of way for twenty-five (25) years, for street-railway purposes, over the following streets to wit [giving the description above mentioned]; * * * all in conformity with map of said route and specifications in the office of the city engineer, and ordinance No. 5784, C. S., adopted November 17th, 1891."

After providing the method in which the road is to be constructed, the character of the rail and the ties, the character of the paving to be done in the streets through which the road ran, and the obligations to be assumed with reference to the paving, repair, and maintenance of the streets, the specifications, approved by city council, provided: "This line may be

operated by any motive power now successfully applied in the United States, except steam. The speed shall not exceed twelve miles per hour, unless by ordinance of the council. Cars shall not stop except at the further side of crossings. * * * To enable bidders to estimate the cost of the paving, the city holds offers to deliver gravel to the purchaser of the franchise at a fixed rate and a fixed time. These offers can be seen at the office of the city engineer. Work of construction shall begin within two weeks after the date of the signing of the contract, and so completed as to be in operation within one year after the same date. A bond of \$50,000, approved by the mayor, shall be given to insure the commencement and completion of the work, and in satisfactory manner, within the dates specified. The party or parties to whom the right of way is sold shall engage and contract with the city of New Orleans to construct a certain number of square yards of gravel pavement, according to the general specifications for such paving, and, together with accompanying Belgian blocks, bunting, curbs, counter-curbs, and gutter-bottoms, which shall be estimated for and computed in the number of square yards, and not to be charged for as an extra, or in addition to said square yards of paving, which shall be constructed on such streets and commencing at such points as the city council may hereafter designate." And by supplementary specifications, showing neither approval by city council nor date, it was provided: "The sale of this franchise, under the right of the city to reject any or all bids, shall be adjudicated to the party or parties who offer to build the greatest number of square yards of gravel pavement, including, without extra cost, paving, curb-planking, curbs, gutter-bottoms, counter-curbs, wings, Belgian block-crossings, and bunting along the tracks and culverts, provided that such bid is not less than 60,000 square yards. The terms upon which the work of paving, etc., can be done are on file in the office of the city engineer."

At the date and place appointed in the advertisement Judah Hart appeared and bid the minimum fixed in the specifications; that is, 60,000 square yards of gravel pavement. This bid was duly reported to the council by the comptroller, and the council thereupon passed ordinance No. 6260, C. S., adopted April 12, 1892, directing the mayor to enter into a notarial contract with Judah Hart for the right of way for 25 years, for street-railway purposes, over the route designated in the advertisement, all in conformity with the map of said route and specifications in the office of the city engineer, and ordinance 5784 C. S., adopted November 17, 1891, and as per his bid of March 28, 1892. The parties thereupon went

before the city notary on the 8th of June, passed the notarial contract provided for by ordinance 6260, and gave a bond for \$50,000, required by the ordinance. On June 28, 1892, a large number of property-holders on Constance street, between Felicity and Calliope streets, petitioned the council not to permit the laying of a double track on that street, as it was a very narrow street, and asking the council to order the removal of one of the tracks provided for in the franchise sold to Judah Hart to some other street. This petition was referred to the streets and landings committee, who referred the matter to a subcommittee. This subcommittee reported that the objection of the property holders on Constance street was well founded, and advised that one of the tracks be changed to Coliseum street from Louisiana avenue to Race street, and on Race street to Camp street, and on Camp street over existing tracks. The report of the subcommittee was taken up by the whole committee, and approved, and this committee thereupon reported an ordinance to the council, modifying the right of way of the franchise granted to Hart. This ordinance was adopted, and became ordinance No. 6595, C. S. It provides that "whereas, the route of the street railroad franchise adjudicated to Judah Hart under the provisions of ordinance No. 5784, C. S., provides for a double track on Constance street, from St. Mary street to Calliope street; and whereas, Constance street, between the points designated, is too narrow for the construction and operation of a double track, regard being had to the interests of the residents on said street; and whereas, it is to the interest of the city that the route of said railroad should be modified so as to take said double track off of Constance street, and to make one of said tracks run on Coliseum street from Louisiana avenue to Race street, and thence to Camp street; and whereas, the said Judah Hart is willing to accept the modification of said route as herein proposed: "Section 1. Be it ordained by the common council of the city of New Orleans, that the route of said railroad adjudicated to Judah Hart under the provisions of said ordinance No. 5784, C. S., be changed, amended so as to read as follows, to wit: * * *," giving the changed route, taking one of the tracks off of Constance street, and the removal of that track from Constance street and Laurel street to Coliseum street, from Louisiana avenue to Race street, through Race street to Camp street, and down a portion of Camp street over the tracks of the Crescent City Railroad. The whole body of the franchise above Louisiana avenue and below Race street remained entirely unchanged.

The second section of the ordinance provided that Judah Hart should signify his acceptance of this order by a notarial

contract, signed by himself and the mayor before the city notary, and authorizing the mayor to enter into such contract with Hart, changing the route of the railroad. This ordinance was adopted on the 2d of August, 1892. While this ordinance was pending, to wit, on July 15th, certain property-holders on Coliseum street, between Louisiana avenue and Race street, presented to the council a petition, protesting against the granting of the right of way to lay a railroad on that part of Coliseum street; the ground of their protest being that petitioners had at a heavy expense recently gravelled the street; that it is the only street running through that part of the city, and the only one of the smaller streets left, not now defaced with railroad tracks; and averring that a great hardship would thereby be worked to the petitioners to have the said street, which they had recently been put to the expense of constructing, ruined, and that it would be a great inconvenience to the general community which now uses the said street as a pleasure drive. In accordance with the provisions of the ordinance, the mayor and Judah Hart appeared before the city notary on the 9th day of September, and executed a notarial contract, embodying the terms of the ordinance.

Work was immediately commenced by Hart under these ordinances, and, as shown by the affidavit of M. J. Hart and the affidavit of G. A. Hopkins, prior to the 15th day of October, 1892, Hart had entered into contracts for the construction and equipment of the said property, amounting to the sum of \$363,050. Large amounts of materials provided for in said contracts had prior to that date been delivered by the contractors. Ten thousand dollars' worth of gravel had been delivered and put in position. Eight thousand seven hundred feet of Camp street, from Louisiana avenue to Joseph street, had been graded, and cross-ties and track material delivered for the roadbed. Coliseum street had been graded for a single track from Louisiana avenue to Napoleon avenue, a distance of three thousand six hundred feet, and cross-ties and track material were delivered for the roadbed. Twelve thousand cross-ties had been delivered at the Carrollton avenue switch from the belt line to be put in the construction of the railroad, and track material for about seven miles of track had been put in position. Thousands of dollars had been spent in the excavation of the streets covered by the franchise, and nearly all the material for the overhead work and construction had been delivered by the contractors and put in place along the route of the railroad.

On the 17th of October, 1892, Newton Buckner and six other persons, claiming to be property-holders on Coliseum street between Louisiana avenue and Race street, being that

part of Coliseum street covered by the modification of the route provided for under ordinance No. 6595 C. S., filed a petition in the civil district court for the parish of Orleans, averring that they were owners of real estate on the designated portion of Coliseum street; that they had lately contributed large sums of money for the purpose of paving said Coliseum street with Rosetta gravel; that by reason of the paving, as well as by the fact that adjoining parallel streets are occupied by street-railroad tracks, said Coliseum street had become a thoroughfare much resorted to by the citizens of New Orleans as a pleasure drive, and that by reason of said paving the value of their property had been enhanced; that the city council had adopted ordinance No. 5784, directing the advertisement and sale of the street-railroad franchise therein mentioned; that the comptroller had advertised the said franchise for sale, but did not, as required by section 4 of act 135 of the Acts of Louisiana of 1888, publish the specifications of the franchise; that the comptroller did not, at the expiration of the delay, as required by ordinance No. 5784, and by the act of 1888, sell to the highest responsible bidder the franchise; but, instead of selling the same, pretended to accept, as the consideration of the franchise, an offer of Judah Hart to furnish the city of New Orleans not less than 60,000 square yards of gravel paving; that by virtue of ordinance No. 6260 the mayor and Judah Hart had entered into a pretended contract with reference to the said franchise; that, as said specifications had not been published as provided by law, and as the aforesaid franchise had not been sold at public auction to the highest under the requirements and limitations of ordinance No. 5784, C. S., and Act 135 of 1888, the said offer of said Hart to acquire said franchise, and the said ordinances Nos. 5784, C. S., and 6260, C. S., and the pretended contract of the 8th of June, 1892, were absolute nullities, and devoid of all legal effect, and did not and could not convey to him the franchise.

They further aver the passage of ordinance No. 6595, C. S., modifying the route as originally adjudicated, and that the franchise or right of way over the part of Coliseum street granted by the modification greatly exceeds in value the rights of way over those streets for which it was thus permitted to be substituted; but that in spite of this fact said change was by said common council ordained without consideration of the city of New Orleans, without publication, and without adjudication of said franchise, as required by Act No. 135 of 1888; that petitioners vainly protested to the common council against the change; that they are informed and verily believe that said Judah Hart, under this ordinance, intends to enter

upon Coliseum street, between Louisiana avenue and Race street, for the purpose of laying a roadbed and tracks for a street railway, the same to be operated by using as motor power the so-called trolley system of electricity," and that, if permitted to do so, he will utterly ruin the paving of Coliseum street, thereby inflicting upon petitioners irreparable injury, besides depreciating the value of their property more than \$10,000; that the trolley system of electricity is an unmitigated nuisance, "pre-eminently dangerous to life, and destructive to peace and comfort," and that its adoption for a narrow street like Coliseum street, which has a width of about 25 feet, would prevent absolutely the safe use of said street by other vehicles, and would render the approach in carriages to petitioners' houses unsafe, if not impossible, and would destroy the quiet enjoyment of their homes. They pray for citation of Hart, and for judgment decreeing—First, that the alleged adjudication to Hart under ordinances Nos. 5784, 6260, and 6595, C. S., and the contracts of date the 8th of June and the 9th of September, 1892, to be illegal, null, void, and of no effect; second, perpetually enjoining Hart from entering upon Coliseum street between Louisiana avenue and Race street, for the purpose of constructing a street railway, under and by virtue of said ordinance and the said pretended contracts, and from disturbing the surface or paving of said Coliseum street between Louisiana avenue and Race street, or making any excavations or constructions therein or thereon in furtherance of the purpose of said ordinance and contract; and, third, praying for a preliminary injunction, in the event of such disturbance, during the pendency of this suit. Hart, being a citizen of New York, appeared, and removed this cause into the circuit court of the United States for the eastern district of Louisiana.

When the record was filed in the circuit court the complainants appeared and filed an amended and supplemental bill, setting forth the bringing and removal of the suit, and reverring all the matters contained in their petition; and further averring that, as front proprietors of property on Coliseum street, between Louisiana avenue and Race street, the railroad proposed to be constructed by defendant and operated by the trolley system of electric cars, by reason of its impairing the pavement on said street and obstructing the highway and the approach to their residences, and by its noise and danger, will be a nuisance specially affecting and injuring irreparably them, and each of them, in their comfort and convenience and rights of property; further averring that under the charter of the city of New Orleans the council had no power to grant authority to said Hart to construct and op-

erate a road by means of the trolley system of electricity. They further show that Hart had entered upon a portion of the street since the filing of the suit in the civil district court, and they pray for a preliminary injunction to restrain him. Notice was given, the matter was heard, the circuit court granted the injunction, and Hart, under section 7 of the act, approved March 3, 1891, has appealed to this court.

On the hearing of the injunction the complainants offered no affidavits in support of the allegations of their petition and amended bill, except the affidavit of one of the complainants, Newton Buckner, as to the truth of the averments of the petition and bill themselves. The defendant offered the affidavit of the city engineer and that of M. J. Hart, together with maps of Coliseum street and Constance street, to show that Coliseum street between Race street and Louisiana avenue was 25 feet wide from outer curb to outer curb, and that there was a space of 9 feet and 2 lines on each side of the railroad track between the centre of the rail and the outer curb, leaving ample space on each side of the track for the use of the general public and the passage and standing of vehicles; and showing that the double track on Constance street would leave only 4 feet and 2 lines between the trend of the rail and the exterior curb—a space entirely too narrow to permit the standing or passage of a vehicle. The affidavit of Brown, city engineer, M. J. Hart, and G. A. Hopkins, engineer, together with the profiles of Coliseum street, and the specifications for the construction of the railroad on that street, tend to show that the taking up of the gravel pavement, the laying of Belgian block between the tracks, and a bunting of the same on each side of the rail, and the renewal of the gravel on the street in accordance with the specifications, will make the street better, more substantial, and more durable for public use than before. The affidavits of R. T. Macdonald and E. J. Hathorne show that the trolley system is not a nuisance, and that it is not dangerous to life or property.

The following are the assignments of error on appeal: “(1) That the court erred in holding that the city council had no right or power to change the route of said road from Constance and Laurel to Coliseum street, from Louisiana avenue to Race street, without three months’ advertisement and adjudication; (2) that the court erred in holding that the adjudication of the whole franchise at a price to be paid in gravel pavement was void; (3) that the court erred in holding that the complainants had any right or authority, under the allegations of their bill, and in the absence of the city of New Orleans as a party in the record, to raise the questions covered by assignment in error No. 2; (4) that the court erred in

holding that the complainants were not estopped, under the facts set forth in the affidavits, from raising any objection to the construction by the defendant of the railway in question under his grants from the city of New Orleans."

Edgar H. Farrar (*B. F. Jonas* and *Ernest B. Kruttschnitt* on the brief), for appellant.

Harry H. Hall and *W. Wirt Howe*, for appellees.

PARDEE, J.—The order appealed from enjoins the defendant from entering upon Coliseum street, between Louisiana avenue and Race street, for the purpose of constructing a street railway, and from disturbing the surface or the paving of said Coliseum street, or from making excavations or constructions therein or thereon, by virtue of certain city ordinances and contracts recited. The propriety of this order is all that is before us for review. Whether the appellees, complainants in the court below, are entitled to all the relief prayed for in their original and supplemental bills must first be determined in the court below, before this court can review on appeal.

The contention of appellees in this court and in the court below, as stated by their counsel in the elaborate brief filed, is as follows: "This suit is brought by complainant, not as taxpayers complaining of a fraudulent or illegal contract prejudicial to the said complainants in common with all other citizens, but by them as owners of realty whose peaceful enjoyment thereof is illegally threatened. They aver that defendant has no right to enter upon the streets aforesaid, for the purpose of constructing his railroad. He answers that he has, by virtue of the authority granted to him by ordinances 5784 and 6595. Complainants reply that, in so far as said ordinances pretend to authorize the trespass complained of, they are illegal, and they pray to have them so declared by the court. They do not ask that, as between the city and defendant, the so-called 'contract' be annulled; but they say when defendant attempts by virtue of them to invade respondents' rights that they are illegal, and do not justify the invasion. They do not attempt to invalidate any of Mr. Hart's so-called 'rights,' except in so far as they are used by him as pretended authority for laying his tracks on Coliseum street between Louisiana avenue and Race street."

Owners of lots abutting on or adjacent to a public street of a city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment, and such rights are property which may be protected by injunction when invaded without legal authority. *Dill. Mun. Corp. § 587b; Dudley v. Tilton, 14 La.*

Question
before the
court.

Rights of
abutting
owners.

Ann. 283; *Schurmeier v. Railroad Co.*, 10 Minn. 82 (Gil. 59); *Wetmore v. Story*, 22 Barb. 414; *Pettibone v. Hamilton*, 40 Wis. 402.

Where there is an unauthorized obstruction or closing of a public street, all the adjacent owners who sustain by such obstruction a special injury can maintain a suit for injunction against the party or parties making the obstruction. *Dudley v. Tilton*, *supra*; *Pettibone v. Hamilton*, *supra*; *Griffing v. Gibb*, 2 Black, 519. In such a suit no other parties defendant than the alleged trespasser are required. *Railroad Co. v. Ward*, 2 Black, 485. In the case under present consideration, it seems that all the necessary parties, if not all the proper parties, are before the court.

The asserted right of appellant to invade Coliseum street was only acquired one month and eight days prior to the institution of the suit for injunction. It was granted by the council of the city of New Orleans, against the public protest of one of the complainants to the suit and other residents and property-holders on Coliseum street. As we gather from the record, the actual invasion of Coliseum street between Louisiana avenue and Race street took place since the commencement of the suit, and then was apparently for the purpose of raising the question of right. Until the actual or attempted invasion of the street, the property-holders thereon were not required to go into the courts to attack a pretended right which, until their street was invaded, in no wise affected them, except in common with all the other property-holders and taxpayers of the city. Considering the public protest of the property-holders, the short period elapsing between the acquisition of the right and the institution of the suit, and that the complainants were not specially called upon to act until their street was actually invaded, we are of the opinion that there has been no acquiescence, no standing by, nor sleeping upon rights, to any such extent as would equitably estop the plaintiffs from maintaining their legal rights.

The transaction between the city of New Orleans and the appellant by which appellant acquired all the rights that he has to a street-railroad franchise on Coliseum street was one of barter and exchange, i.e., a street-railroad franchise was exchanged for a certain amount of public work and material in the nature of gravel-paving to be thereafter constructed on the streets of the city. The specifications as to the street-railroad franchise disposed of were reasonably definite and certain. Those with regard to gravel-paving to be furnished were, perhaps, definite enough as to character and composition,

Laches of
abutting
owners.

Sale of rail-
way franchise
—"Lowest
bidder"—
Consideration.

but were indefinite as to a very important element of cost—the street or streets upon which the work was to be done being left to the after-determination of the city council. The expense of building, say 60,000 square yards of gravel pavement in the streets of New Orleans, largely depends upon the location of the streets, the excavations or filling necessary, and the distance from the main line and switches of the Illinois Central Railroad. The nature of the exchange offered by the city was such as to necessarily limit competition, and to a marked degree. No one, however desirous he may have been of acquiring the street railroad franchise offered by the city council, could safely bid for the same, unless he was also willing and ready to deal in gravel, and undertake the business of paving streets with gravel; and certainly no contractor engaged in the business of street paving could have bid on the contract to the advantage of the city unless his means permitted him to buy, own, and operate a street railroad franchise.

Complainants in the court below (the appellees here) contend that the said transaction was and is absolutely null and void, because entered into without authority on the part of the city council, and in contravention of the express limitations imposed upon the city council in the charter of the city and by subsequent acts of legislation. They say (1) that the city of New Orleans has no authority under its charter to authorize a street railroad to be operated with electric-power as a motor; (2) that the use of the overhead "trolley" system is a nuisance; (3) that the street-railroad franchise disposed of to appellant was not advertised according to law; (4) that the franchise, as to Coliseum street, between Louisiana avenue and Race street, was not advertised at all; and (5) that under the act of 1888 the city of New Orleans is prohibited from disposing of a street-railroad franchise otherwise than for cash and to the highest bidder. Any one of these objections, if well taken, sustains the propriety of the order appealed from.

The charter of the city of New Orleans (Act No 20, Acts La. 1882) expressly declares that the said city "is hereby created, incorporated, and established as a political corporation by the name of the city of New Orleans, with the following powers, and no more." Section 8 of the said charter (paragraph 13) declares that the city council shall "have the power to authorize the use of the streets for horse and steam-railroads, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use the same track and turntable, and compel them to keep conductors on their cars, and compel all such companies to keep and

repair the streets, bridges, and crossings through or over which their cars run." And section 21 provides that "all contracts for public works or for materials or supplies ordered by the council shall be offered by the comptroller at public auction, and given to the lowest bidder who can furnish security satisfactory to the council; or the same shall, at the discretion of the council, be advertised for proposals to be delivered to the comptroller in writing, sealed, and to be opened by such comptroller in the presence of the finance committee of the said council, and given to the persons making the lowest proposals therefor, who can furnish security satisfactory to the council: provided, that the council shall in either case have the right to reject any or all of the bids or proposals."

At the same session of the legislature, it was provided "that thereafter, whenever the city of New Orleans, through her proper authorities, shall contract with private corporations or individuals for the sale or lease of public privileges or franchises, such as the right of way for street-railroads or for other public undertakings within her legal power and control, the price paid for the sale or lease of public privileges or franchises shall be applied by such city in the performance of work of public improvement of a permanent character, such as paving of streets, embellishing parks," etc. Act 81, Acts La. 1882.

By Act 135 (Acts La. 1888), entitled "An act further defining the powers and duties of the council and officers of the city of New Orleans, and imposing additional limitations thereon," it is provided in the first section—"That neither the council of the city of New Orleans, nor any committee thereof, nor any of the officers of said city, shall have power to bind the city by any contract for any public work, or for the purchase of any materials or supplies for any of the departments of the city government, unless there shall have been previously passed a resolution authorizing the said contract or the said purchase, and unless the said contract for public work or for the furnishing of said materials and supplies shall have been let by the comptroller to the lowest bidder, as provided in section 21 of said charter: provided, however, that in cases of emergency the officers of the various departments may make bills for supplies of material not exceeding fifty dollars; but in all such cases immediate report in writing of the making of such bill shall be made by the head of the department to the mayor, setting forth the reason of its action, which report shall be laid by the mayor before the council, and receive the approval of that body before the said bill is ordered paid."

And in the second section—"That on the first of January

and July of each and every year each and every head of every department of the city government shall lay before the council an estimate of the supplies and materials (within the limitation of the appropriations made in the budget for his department) that may be needed in his department during the current six months; and the said council shall approve or modify, in its discretion, said estimate, and shall thereupon direct the comptroller to advertise and adjudicate the contract to furnish said supplies and material, or so much thereof as may be needed, to the lowest bidder, as provided in section 21 of the city charter." And in the fourth section—"That said council shall not have power to grant, renew, or to sell or to dispose of any street-railroad franchise, except after at least three months' publication of the term and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in section 21 of the city charter."

The intention of the legislature in enacting the foregoing provisions is apparent. The powers given to the city council under the charter are to be strictly construed. In all purchases of public work, supplies, and material full notice and free competition are required, and the contracts therefore are to be given to the lowest bidder. In any disposition of a street-railroad franchise, either by grant or renewal, a full publicity of exactly the franchise to be disposed of, with free competition, and every adjunct to secure the best price, is required. No room is left, if the statutes are complied with, for secrecy, jobbery, favoritism, or the exercise of political and private influence, conceded by council to be the mischief sought to be remedied, particularly by the act of 1888 entitled "An act further defining the powers and duties of the council and officers of the city of New Orleans, and imposing additional limitations thereon."

An examination and comparison of these acts in the light of the conceded legislative intention lead to the further conclusion that in the purchase of public works, supplies, and material, or in the disposition of street-railroad franchises, the contract of sale is alone permitted to the city council. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Civil Code La. art. 2439. It is only by a sale in public market that the free competition exacted by the statutes can be obtained. In order to purchase at public auction and from the lowest bidder, and to dispose of at public auction to the highest bidder,—almost of necessity, it seems,—the measure of value must be in current money. The act of 1882, quoted above, distinctly infers

a price or sum of money to be obtained from the sale or lease of street-railroad franchises, and directs the application thereof. The act of 1888 clearly implies in every section quoted that the city council is to purchase public work and material and dispose of street-railroad franchises for current money. The judge of the circuit court, on this point, says:

"It seems to me that where a bid is invited in corn or wine or any goods, wares, or merchandise it necessarily more or less circumscribes the freedom of the competition, for there is more or less difficulty in obtaining any article, even to those who have the money. It is not enough that the city needs the article; the article itself must also be as easily obtainable as money. The substitution of anything for money itself would naturally give an advantage to those who had that article, and who know how or where and upon what terms it could be purchased, and would make the sale less calculated to absolutely secure the highest price, and thus defeat the object of the statute. Section 4 (Act. No. 135 of the Acts of 1888), above referred to, requires that the sale shall be to the highest bidder by the comptroller, as provided in section 21 of the city charter. That section, which is found on page 25 of the Acts of 1882 requires that the sale shall be offered by the comptroller, at public auction, and given to the lowest bidder. Now, it seems to me clear that, considering the object the legislature had in placing this prohibition upon the common council, requiring the long advertisement of three months, and sale at auction of railroad franchises, they meant that the sale should be for that which would least restrict the number of purchasers, as well as for the amount of the bid, and therefore meant that it should be for money; and that the sale of the entire franchise to the defendant, having been for gravel pavement, and not for money, is invalid." 52 Fed. Rep. 837.

This reasoning is very cogent. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All

acts beyond the scope of the powers granted are void." Dill. Mun. Corp. § 89.

As has been noticed above, the transaction between the city of New Orleans and the appellant, disposing of a street-railroad franchise, was one of barter and exchange, necessarily limiting competition. The authority to make such a transaction is not granted in express words in the charter, nor is it necessarily or fairly implied in or incident to the powers expressly granted; nor is it essential to the declared objects and purposes of the corporation, but, on the contrary, as has been shown, it is in conflict with the legislative intent as declared in the charter and in the subsequent legislation referred to. At all events, there is a fair, reasonable doubt concerning the power of the city council to enter into the transaction complained of, and the same should be resolved against the corporation, and the power denied. "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." Rev. Civil Code La. art. 12. The other nullities alleged against the rights of appellant need not be considered. It follows that the order appealed from should be affirmed, and it is so ordered.

Rights of Abutting Owners—Injunction against Construction of Street Railway.—A New York statute of 1872 conferred upon the city of Elmira power to convert an abandoned portion of a canal into a public street, reserving to the state the fee of the land. In 1874, the provision of the constitution prohibiting the legislature from leasing or otherwise disposing of the canals was amended so as to empower the legislature to confer on the said city title to the canal in question. The laws of 1878 provided that all of that portion of the said canal in question "is hereby released and transferred to the city of Elmira for the uses and purposes of a street, on the condition that the city pay a certain sum to adverse-claimants." *Held*, that the state took the fee of the street, and that abutting owners who extended the side-lines of their roads to the centre of the canal-bed, for the purpose of acquiring, under the laws of 1881, the title remaining in the state, were not entitled to have its occupation by a street railroad enjoined. *De Witt v. Elmira Transfer R. Co.*, 184 N. Y. 495.

Abutting Owner cannot interfere by injunction to prevent the unauthorized construction of street railway, unless he suffers some special and serious injury. See *Van Home v. Newark Pass R. Co.* (N. J.), 50 Am. & Eng. R. Cas. 285; *Halsey v. Rapid Transit R. Co.* (N. J.), 46 Am. & Eng. R. Cas. 76.

FORWOOD

v.

CORPORATION OF CITY OF TORONTO.

(22 *Ontario Reports*, 351.)

Street Railways—Personal Injury—Negligence.—The plaintiff in broad daylight having hailed a westward-bound tramway car, on the north track, crossed over from the south side of the street to get into it; the eastward-bound car at the time was coming along on the south track at a fast trot, but was some 300 feet away, to the west. The plaintiff was somewhat intoxicated. As he took hold of the westward-bound car to board it, he fell, and the eastward-bound car passed over his foot, which was on the rail. The jury found that there was no negligence on the part of the defendants, and that the plaintiff was not guilty of contributory negligence, on which the trial judge entered judgment for the defendants. *Held*, that the attendant or surrounding circumstances were, in the absence of any explanatory evidence by the defendants, sufficient to raise the presumption that there was negligence on the part of those in charge of the eastward-bound car, the consequence of which was the happening of the accident, and that there must be a new trial.

THIS was an action brought by Thomas W. Forwood against the City of Toronto for damages resulting from a street-railway car running over his foot, under circumstances which are fully set out in the judgments. At the time of the accident the defendants were the owners and proprietors of the street railway.

In answer to questions submitted, the jury found that the street-railway officials were not guilty of negligence causing the accident; but, in answer to the question whether the plaintiff could, by exercise of reasonable care, have avoided the accident, they also replied in the negative.

The learned Judge directed judgment to be entered for the defendants, dismissing the plaintiff's action with costs.

BOYD, C.—The trial judge expresses himself as not satisfied with the result. The reading of the evidence leaves an impression of surprise on my mind that the plaintiff should have suffered hurt as he did unless some strange carelessness is to be attributed to the driver of the Sherbourne Street car, by which the plaintiff was run down. The person called as the driver of this car disproves his presence at any such accident as is in question, and in effect repudiates the idea that he could or would have driven over a man in the position of the plaintiff. Taking the

defendants' own account of what happened, I cannot explain the accident unless on the theory that the driver of the Sherbourne car went blindly and recklessly on, notwithstanding that a man was partly on the track. No one can accept the suggestion of the driver of the Spadina car, that a passenger is running into danger if he tries to get into a stationary car by crossing over the track on which another car is approaching at a distance of 300 or 400 feet. But it was about this distance from the eastward-bound Sherbourne car that the plaintiff crossed King Street from the south side to get on the Spadina car, which had stopped at his hail. According to the conductor of this car, the plaintiff came staggering on as if in liquor, and as he took hold of the rear-rail he fell, and as the conductor was trying to get him up the other car passed and crushed his toe under the wheels. The driver of the Spadina car admits that if the driver of the approaching car had been doing his duty he should have seen the plaintiff as he came staggering across the road, and also that he should have seen him as he sat or lay partially upon the track. This driver also says that the approaching car was coming at a fast trot, but, according to the other driver called (Abbot), it is against the rules of the company to go at that rate along King Street. The defendants' own witnesses strongly suggest careless handling of the Sherbourne car as the operative cause of the accident. If the plaintiff's story is taken, he swears that the driver of the Sherbourne Street car, if he liked, could have prevented running him down, and this is not contradicted.

So it comes that in the afternoon of a summer's day on King Street, part of a man's foot is taken off, the man having been presumably seen recumbent or helpless on the rail more than a hundred feet ahead of the approaching car which did the mischief; and no explanation is given why it could not be avoided.

The Spadina car stopped to receive the plaintiff as a passenger; the driver of the car coming the opposite way saw this, and it was his business so to manage his going car as not to run over or against one who had to cross the track to gain the other car; and his duty of taking care is not lessened but increased if he sees the person has, from any cause, fallen on the street. All the circumstances here point to careless haste on the part of the driver, and do not indicate that the plaintiff stepped so suddenly and unexpectedly into the track of the car that it was impossible to pull up. As the usage of the street cars is to stop not at regular crossings, but at any point where a passenger appears, it becomes the duty of a car approaching that point to act with such caution as is required of persons driving over a crossing for foot travellers, that is,

to drive slowly, cautiously and carefully (per POLLOCK, C.J., in *Williams v. Richards*, 3 C. & K. 81). I am disposed to think with an eminent Scotch judge (Lord Moncrieff), that at such a point there is a strong presumption of negligence against a driver who runs down a person in daylight. *Cable v. Petrie*, 6 Rettie, 1076 (1879). I may also note another Scotch case decided in 1884, which is not without pertinence to the present,—*McDermaid v. Edinburgh Tramways Co.*, 12 Rettie, 15,—of which this is the head note or rubric: A cab had stopped to take in a passenger in a steep and narrow street; one of its wheels rested on the tramway rail. The driver of the tramway car proceeding down the incline saw the obstruction fifty yards away and whistled. He was going slowly, but he did not stop his car, because he expected up to the last moment that the cab would be drawn out of his way, and then from the steepness and greasiness of the street he was unable to do so. The car caught the cab and damaged both it and the horse. *Held*, that the driver was in fault in not stopping his car when he first saw the cab, and that the cabman was not guilty of contributory negligence. In the judgment Lord Moncrieff said: "I think it is plain that the tramway driver was not entitled, on any pretence whatever, to drive against this cab if he could by any means avoid it. If he could not by any means avoid it, that might make a case of unavoidable accident. * * * It would be a very dangerous precedent if we were to sanction the notion that the driver of a tramway car may drive into any obstacle that does not at once get out of his way."

This case should be sent down for further trial, and with that view vacate the judgment and reserve the costs to abide the result.

FERGUSON, J.—After a perusal of the evidence I do not think that the plaintiff's account of the manner in which he approached the car going westward can be, for the purposes of this motion, considered the correct account. There is too much evidence against it, and it is not to me reasonable. What the evidence in respect to this does show, as I think, is that the plaintiff, being on the south side of King street, "hailed" the car that was going westward; that the driver of that car saw him and stopped his car; that at the time the plaintiff "hailed" this car, the car going eastward was some 300 or 400 feet away (westward) from the car that was stopped, and was approaching (on the other track, of course) at a "fast trot;" that the plaintiff, having so "hailed" the car that he wanted, did not immediately proceed to it, but hesitated, so that the driver of

Evidence in
the case.

the car thought he intended to wait where he (the plaintiff) was until the car going eastward should have passed. This, however, the plaintiff did not do, for it seems manifest that he proceeded to the rear end of the car that he had "hailed," and which had stopped before the car going eastward arrived at that place.

For some reason, that is not fully shown or explained, the plaintiff was at the side of the rear steps of this car, which was then standing, had hold of the wire (railing, it is called in the evidence), but was down upon the street with his right foot extended southward, and, as appears by the result, upon or over the rail of the other track. This appears to have been his position. There is some difference between the witnesses as to whether his face was eastward or westward, and other differences as well, but I do not consider these of importance.

This seems to be substantially the position of the plaintiff immediately before the happening of the accident, and I do not see that the evidence shows that there was any negligence on the part of those who were in charge of the car that was going westward. The plaintiff, in his evidence, complains that this car did not stop when he "hailed" it, and this he desires to make out was negligence. I do not see that it would be so in the sense required here; but, even if it would have been negligence, the plaintiff's evidence in regard to the fact seems to me to be entirely overborne by the evidence of the other witnesses who speak upon the subject.

Assuming, then, that there was not negligence on the part of those in charge of the car going westward, the plaintiff's case is that he was, immediately before the happening of the accident, in the position that I have endeavored to describe, on the street opposite the steps at the rear end of the car going westward, and that the car going eastward was negligently driven over his foot to his injury. As already stated, the plaintiff must have gone across the track in front of the car going eastward very soon before the accident. This car was approaching on what is called a "fast trot." It was admittedly the duty of the driver to keep a reasonable lookout in front of his horses. Whether he did this or not, he did drive over the plaintiff's foot. There is evidence that the plaintiff was staggering from intoxication when he so crossed from the south side of the street, and if so, and the driver was looking as he should have done, one would say that he must have noticed this condition of the plaintiff. Against this, however, the plaintiff says that he was not drunk at the time. He does, however, admit that he had been drinking, and his evidence on the subject does not wear a firm aspect. I think it should

be taken as proved that the plaintiff was in this condition as he crossed from the south side of the street before the car going eastward.

This car, though upon a track, was entirely under the control of the defendants; that is to say, no other person had any share in the management of it; it was approaching at the rate of speed above alluded to. Driving over a person on the street in broad daylight is, I think, an event of unusual occurrence; it is a thing that rarely occurs if those who drive use proper care. The driver of this car might have seen, I think ought to have seen, the plaintiff so crossing before his car in the condition in which he was; and although it may be said that the plaintiff did not by direct evidence show any specified negligent act or omission on the part of those in charge of the car on which to rest his action, yet the happening of the accident and these attendant or surrounding circumstances are, I think, sufficient to raise the presumption that there was negligence on the part of those in charge of this car, the consequence of which was the happening of the accident. There is, I think, reasonable evidence, in the absence of any explanation by the defendants, that the accident arose from want of care on their part. See *Scott v. The London and St. Catharine's Docks Co.*, 3 H. & C. 596, 601. *Shearman and Redfield on Negligence* (4th ed.), sec. 59, where it is said: "The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault." The same subject is referred to by Baron Channell in *Bridges v. North London R. W. Co.*, L. R. 6 Q. B. at pp. 391 and 392, in the Exchequer Chamber, and although the case there was not one in which the proposition applied, yet the remarks of the learned judge indicate clearly that there are cases in which the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.

There are many cases and authorities sustaining this proposition, and it appears to me not to be necessary to go nearly so far to apply the proposition in the present case, as the court went in the case of *Flannery v. Waterford and Limerick R. W. Co.*, Ir. R. 11 C. L. 30.

It is true that all the evidence to which I have alluded was not given by the plaintiff. There was, however, no motion for a nonsuit, and as I read the evidence, all these circumstances are shown. I cannot but be of the opinion that the burden was upon the defendants of showing what has been sometimes called their "freedom from fault."

What the defendants did was to set up and rely upon "contributory negligence" of the plaintiff. Except in cases such as that referred to by Lord Fitzgerald in *Wakelin v. London and Southwestern R. W. Co.*, 12 App. Cas. at p. 52, where the propositions of negligence and contributory negligence are so interwoven as that the contributory negligence is brought out in the evidence of the plaintiff's witnesses, the issue respecting contributory negligence has to be proved by the defendant, and is a question of fact for the jury. To prove contributory negligence of the plaintiff the defendants were called upon to show that the plaintiff was guilty of negligence that was the proximate cause of the injury.

It has been said that the proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which the event would not have occurred. *Shearman and Redfield on Negligence* (4th ed.), vol. 1, sec. 26.

In *Smith on Negligence*, at p. 227, contributory negligence is defined as being that sort of negligence which, being a cause of the injury, is of such a character that the defendant could not avoid the effects of it.

See the cases *Tuff v. Warman*, 5 C. B. N. S. 573; *Radley v. The Directors of the London and Northwestern R. W. Co.*, 1 App. Cas. 754. Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief, the plaintiff's negligence will not excuse him. A defendant, in proving contributory negligence, must show that the plaintiff's negligence was of such a character that the exercise of ordinary care upon the defendant's part would not have prevented the plaintiff's negligent act from causing the injury, and this is the sort of negligence that the law calls "contributory negligence." *Smith on Negligence*, 227. Proving less than this would not be proving "contributory negligence."

When, therefore, the defendants undertook to prove contributory negligence in the present case, this involved proving not only that the plaintiff was guilty of negligence, but also that the plaintiff's negligence was such that the accident could

not have been avoided by due diligence on their part, that is to say : that the negligence of the plaintiff was the proximate cause of the accident.

The jury has found that the plaintiff might, by the exercise of reasonable care, have avoided the accident. This seems to me to have reference to the plaintiff's conduct from the beginning. Of course, if he had not been where he was, the accident would not have happened as it did, and it may be quite right to say that he was guilty of some negligence in being there as he was, but this is not really the question, which is, assuming the plaintiff to have been guilty of negligence, could the defendants by the exercise of reasonable care, notwithstanding such negligence of the plaintiff, have avoided the accident? This was, as I think, the real question.

The jury has found that the defendants were not guilty of negligence causing the accident. Now, assuming the real question to be as I have now stated it, can it be said that defendants gave evidence on which a jury might reasonably find in their favor? According to my view of the matter, there is really no evidence on the real point; the burden, it will be remembered, being upon the defendants. The plaintiff being where he was, say negligently there, if the driver of the car going eastward could and should have seen him, and after seeing him had time by a reasonable exertion to stop his car before it passed over the plaintiff's foot, and did not do so, then the accident must be considered to have taken place by the want of care of the defendants. The driver of this car was not called, nor, so far as I can see, was any material evidence given on this immediate subject. The driver that was called was manifestly not the driver of this car, I think. He simply knew nothing of the matter. For these reasons I am of the opinion that the finding of the jury acquitting the defendants of negligence causing the accident does not rest upon evidence on which a jury might reasonably so find, and cannot be permitted to stand.

I may add that if the finding of the jury that the plaintiff might by reasonable care have avoided the accident means that he might have done this notwithstanding any negligence of the defendants in respect to the car going eastward, which was the one that did the injury, on the rule or principle mentioned in the *Law Quarterly Review* of 1886, vol. 2, p. 507, referred to in *Shearman and Redfield on Negligence* (4th ed.), vol. 1, sec. 99, namely : The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it, I should then be of the opinion that the finding is unsupported by evidence on which a jury might reasonably find

as they did ; for, before there could be any reasonable finding on the subject, it must be shown what was the conduct of the car going eastward, what time there was within which to act, etc., and there is no evidence of this so far as I see. But I do not think that such is really the meaning of the question and answer.

I am of the opinion that the verdict should be set aside and a new trial had. I understand that the learned trial judge is not satisfied with the verdict, and this is an additional reason for setting it aside.

ROBERTSON, J.—I am of the same opinion. If the evidence of the driver Abbot is to be believed, it was not his car that ran over the plaintiff's foot—in fact he shows that it must have been some other Sherbourne street car, and most likely was. Abbot says he left the Walker House, at the corner of Front and York streets, at two minutes past four o'clock, and it takes eight minutes to go from there to George street. The accident happened in King street, opposite Bond's livery office, which is less than half way between the Walker House and George street. This would make Abbot's car due at the place of the accident at a little before 4.06 p.m. The driver of the west-bound car says that at the time of the accident he looked at his watch and it was exactly twelve minutes after four ; this would not be ten minutes but six minutes after Abbot had passed down. Then his evidence shows that a Sherbourne street car leaves the Walker House every seven minutes, so that the next car after that driven by Abbot would leave there at 4.09 ; this would bring the car to the scene of the accident at a little before 4.13. Making allowances for differences in watches, etc., it is reasonable, in connection with Abbot's positive denial that his car caused the accident, to assume that the car which followed him was the car which caused the injury to the plaintiff. If the defendants thought they could have discharged themselves from liability by calling the driver of the other Sherbourne street car, they doubtless would have done so ; it was an absurdity to place in the witness box the driver of a car who could not have caused the accident, for the reason, if these two drivers are right as to time, that he must have been at the time of the accident somewhere east of Church street. It was all very well for counsel to say that he could not find any driver of a Sherbourne street car who knew of the accident. What he should have done was to call the man who drove the car which left the Walker House at 4.09, as well as the driver Abbot, who left at 4.02. He did not do so, and the consequence is that he has not established what, in my judg-

ment, he must establish in order to be entitled to a verdict against the evidence of the plaintiff and his witnesses, viz., that the accident was not caused by the negligence of the driver of the Sherbourne street car. For that reason, I think, there should be a new trial.

But there is another ground which, in my judgment, entitles the plaintiff to a new trial, and it is this: The learned counsel for the defendant admits that he appealed to the jury, one half of whom, it is said, were ratepayers of the city, in such a way as to excite what may be called local prejudice; he reminded the jury that they were ratepayers, and that if they gave damages to the plaintiff it would be in effect giving a verdict against themselves. I don't know that he put it quite so strongly as that, but he certainly alluded to the fact of their being ratepayers, sitting in judgment on a case in which they were, to a certain extent, pecuniarily interested. In my judgment, this was going too far. It is true the right of challenge might have been exercised by the plaintiff, and it is not usual to grant a new trial on the ground that a juror may be indirectly interested, as, for instance, in a case where an action is brought against a joint stock company, and a juror happened to be a stockholder, in the absence of challenge and that nothing could be charged against the juror, in the way of misconduct, while in the discharge of his duties, a verdict could not be disturbed. But here we have counsel for the defendants actually inviting the jurors, who are ratepayers in the city against which the action is brought, to protect their own interests, which could most effectively be accomplished by rendering such a verdict as was given in this case. In *Williams v. Great Western R. W. Co.*, 3 H. & N., at p. 870, POLLOCK, C.B., said: "This was a motion for a new trial, on the ground of one of the jurymen being a shareholder in the company, and consequently open to a challenge if the fact had been known. Generally speaking, where there is ground of challenge, but no objection is taken, etc., that is no reason for granting a new trial. We cannot say that there are no circumstances which could induce the court to interfere; * * * the court might interfere if they perceived that injustice had been done." Here, according to my view, an injustice has been done, and taking into account the whole of the evidence as well as the charge of the learned judge who tried the case, I cannot divest my mind of the idea that the jury were more or less influenced by the appeal made to them as ratepayers.

There should be a new trial, all costs to abide the event.

Street Railways—Injuries to Persons in the Street.—Cable-cars—Duty of Gripman.—In *Schnur v. Citizens' Traction Co.*, 153 Pa. St., 29, in an action against a street railway company for the death of a child, where it appeared that the gripman instead of attending to his duties was standing on one side of the car, looking toward the houses, the court, after deciding that the question of negligence was for the jury to determine, laid down the following rule for the conduct of gripmen: "The running of this class of cars through the crowded streets of the city is necessarily attended with danger. In fact, it is difficult to have rapid transportation through a city without an element of danger. Very much depends upon the care of the gripman. He should always be on the alert to avoid danger, and his attention should never be diverted from his duties. He should keep his eye constantly on the track before him. If he is permitted to gaze at houses or other objects while the car is in motion, and an accident occurs by reason of such conduct, the company employing him must expect to be held responsible; and it is suggested, for the benefit of such corporations, as well as for the safety of the public, that under no circumstances should any one be allowed to ride in the cab with the gripman. Such a matter cannot fail to distract his attention from his duties, and may be the cause of some serious accident."

In *Baltimore Traction Co. v. Wallace* (Md., April 21, 1893.), 26 Atl. Rep. 518, it was held that, where street cars are capable of attaining a speed of ten or twelve miles per hour, it is the duty of the gripman, not only to see that the track is clear, but, also, to keep a constant outlook for persons approaching the track.

Electric Railway—Prima-facie Negligence of Company.—In *Will v. Westside R. Co.*, 84 Wis., 42, it was held that the evidence made *prima-facie* case for the plaintiff, where it appeared that while driving his team with a heavy load on the defendant's track, he saw an electric car approaching at a distance of two or three blocks, and at once turned the team off the track in an attempt to get the wagon off also, which he was unable to do on account of the slippery condition of the rails, it appearing that the driver made no effort to lessen the speed of the car which collided with the wagon, and injured the plaintiff.

Rate of Speed in Dark Alley—Negligence.—In *Gilmore v. Federal St. & P. V. R. Co.*, 153 Pa. St. 31, it was held to be negligence for an electric car company to run a car along a dark narrow alley in the night-time so fast that it could not be stopped within the distance covered by its own headlight. The court said: "Street-railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks. The public have a right to use these tracks in common with the railway companies; and therefore, while the rights of the latter are in some respects superior to those of the former, as was said in *Ehrisman v. Railway Co.*, 150 Pa. St. 180, 51 Am. & Eng. R. Cas. 190, it is not negligence, *per se*, for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down; but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley, on a dark night, at a rate of speed that will not permit its stoppage within the distance covered by its own headlight."

Defective Rails.—In *Bradwell v. Pittsburgh & W. E. R. Co.*, 153 Pa. St. 105, it was held, in an action against a street-railway company for personal

injuries caused by an upturned rail, that an instruction declaring it to be the duty of the company to keep its track in proper repair, that this duty was an implied condition of the grant of the franchise, and that neglect to do so was negligence which entitled the plaintiff to recover if he was not guilty of contributory negligence, was not erroneous.

Contributory Negligence.—In *Wheelahan v. Philadelphia Traction Co.*, 150 Pa. St. 187, it was held that, where the plaintiff undertook to cross a street in a wagon covered with a hood, confining the view of the track to thirty feet, the failure to lean forward to look out for an approaching car was negligence *per se*, barring recovery for injuries received in a collision.

When Contributory Negligence Does not Bar Recovery.—In *Baltimore Traction Co. v. Wallace* (Md., April 21, 1893.), 26 Atl. Rep. 518, it was held that although a pedestrian was guilty of contributory negligence in attempting to cross a car track, the company was liable for injuries to such person if its employes could have avoided the accident by ordinary care after seeing the person upon the track, or were able by the exercise of care to discover her on the track, or approaching it under circumstances of peril.

Negligence of Driver not Imputed to Occupant of Vehicle.—If the plaintiff herself was free from negligence, and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon. *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601.

PARKHURST

v.

CITY OF SALEM *et al.*

(*Oregon Supreme Court, Feb. 13, 1893.*)

Power of City to Grant Exclusive Franchise to Street Railway Companies.—A grant to a city of exclusive power "to permit, allow, and regulate the laying-down of tracks for street-cars" is not sufficient to authorize the granting to street-railway companies of exclusive franchises or privileges in the occupation of streets.

APPEAL from Marion circuit court.

Tilmon Ford and *Wm. M. Kaiser*, for appellant.

J. J. Shaw, *M. W. Hunt*, and *Paxton & Paddock*, for respondents.

BEAN, J.—This is a suit to enjoin the defendant corporation from constructing, maintaining, or operating an electric street

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railway, under franchise granted to it by the city of Salem, on certain of its streets, on the ground that the city had previously granted to plaintiff's assignor an exclusive franchise for 30 years for a similar railway, on the same streets, which plaintiff and his assignors had constructed and had in operation

at the time the franchise was granted to defendant. The construction and operation of defendant's road, although on the same streets, does not in any way interfere with or prevent the maintenance and operation of the road belonging to plaintiff, except that it may lessen the amount of traffic thereon; and hence the only question presented at the argument, noted in the briefs, or necessary to be considered, is whether the city of Salem had the power to grant to plaintiff's assignor, for a term of years, or at all, the exclusive right to occupy its streets for the purposes of a street-railway. This depends upon the power granted to the city by its charter. By section 6 of the act incorporating the city of Salem it is provided that "the mayor and aldermen shall compose the common council of said city, and at any meeting shall have exclusive power" to exercise certain enumerated granted powers, such as "to provide for lighting the streets, and furnishing the inhabitants with gas or other light, and with pure and wholesome water; to establish hospitals; to license, tax, and regulate auctioneers; and to license, tax, and regulate hacks, cabs, wagons, carts; and to provide for the establishment of market-houses and places," and "to permit, allow, and regulate the laying-down of tracks for street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe." Laws 1889, p. 528. The precise question, then, is, Had the city of Salem, under the grant of an exclusive power, "to permit, allow, and regulate the laying-down of tracks for street cars," upon such terms and conditions as it may prescribe, the power to grant for a term of years the exclusive right to occupy its streets with street railroads?

At the outset it may be conceded that the legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant exclusive privileges or franchises of the character under consideration, and that it may, subject to similar limitations, authorize the exercise of like powers by a municipal corporation as to all matters of a purely municipal nature. 2 Dill. Mun. Corp. § 701; New Orleans Gas-light Co. v. Louisiana Light, etc., Co., 115 U. S. 650, 10 Am. & Eng. Corp. Cas. 639; Water-works Co. v. Rivers, 115 U. S. 674, 10 Am. & Eng. Corp. Cas. 662;

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Louisville Gas Co. v. Citizens' Gas-light Co., 115 U. S. 683, 10 Am. & Eng. Corp. Cas. 671; *Railway Co. v. Jones*, 34 Fed. Rep. 579. "But," says Mr. Justice BREWER in *Horse Ry. Co. v. Transit Ry. Co.*, 24 Fed. Rep. 307, "as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not probable corresponding benefit to the public." Hence the well-settled rule of construction, applicable alike to both legislative grants and to those made indirectly through the action of municipal corporations, that exclusive franchises or privileges are not favored, and are always construed most strongly in favor of the state and against the grantee. If there is any ambiguity or doubt arising out of the language used as to whether an exclusive franchise has been conferred or authorized to be conferred, it must be resolved against the person or corporation claiming such grant. 1 Dill. Mun. Corp. § 89. "Public grants," says BRADLEY, J., "are to be so strictly construed as to operate as a surrender by them of the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of a public character." *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 29 Am. & Eng. Corp. Cas. 307. The legislature has, as the general representative of the public, plenary powers over the streets and highways within the limits of a municipality, and "has, unless specially restricted by the constitution," says Mr. Dillon, "the power to authorize the building of a railroad on a street or highway without the consent of the municipal authorities, and may directly exercise this power, or devolve it upon the local or municipal authorities." 2 Dill. Mun. Corp. 701. But a general grant of power to a municipal corporation, which is but a mere local agency, to authorize the use of its streets for such purposes, while it carries with it by implication all such powers as are clearly necessary for the convenient and proper exercise of the authority expressly granted, does not authorize the city to grant an exclusive franchise for that purpose. When an exclusive privilege of franchise to use the streets of the city for the purpose of a street railway is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. As was said in *State v. Gas-light & Coke Co.*, 18 Ohio St. 293: "It must be found on the statute-books, in ex-

press terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear." Nothing short of express legislative authority will authorize a municipality to grant such a privilege, or to enter into such a contract. 15 Amer. & Eng. Ency. Law, 1055; 16 Alb. Law J. 104; 26 Amer. Law Rev. 675.

Now, the charter of the city of Salem does not in express terms confer upon the city the power to grant an exclusive franchise for a street railway; nor can such power be implied, because it is not essential to carry into effect the powers expressly given. *Burnett v. Denison*, 145 U. S. 135, 40 Am. & Eng. Corp. Cas. 622; *Com. v. Railway Co.*, 27 Pa. St. 339. The only power given is "to permit, allow, and regulate," and this must be taken as the measure of its powers in the premises; and by all the authorities this is not sufficient to authorize the granting of exclusive franchises or privileges. It is true this power, so far as granted, is by the charter made exclusive; that is, the city alone has the right and power to permit, allow, and regulate the use of its streets for the purpose indicated. To this extent it is endowed with complete legislative sovereignty. That sovereignty has no limit, so long as the city keeps within the powers granted. But the exclusive power "to permit, allow, and regulate" the laying-down of cartracks is quite a different thing from the power to grant an exclusive permit for that purpose. The one case presupposes a continuing right and power in the city, to be exercised whenever, in the opinion of the council, the public conveniences or necessity may require, while the other is a right to delegate to some private individual or corporation a portion of the municipal authority over the streets, and vest the exclusive power in its grantee to permit the use of the streets by another railway. If the city has the power to grant an exclusive privilege for a street railway, it has, under the same section of the charter, like powers in reference to water and gas pipes, electric-light and telephone-wires and poles, and many other enumerated powers. And, as Mr. Justice COOLEY said in *Gale v. Kalamazoo*, 23 Mich. 344: "If it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might in various directions engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements, and depriving

the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless.

The charter of the city of Salem only confers upon the municipality the general power to permit or allow the use of its streets for street-railway purposes, and under such a power the adjudged cases are practically unanimous that the city cannot grant exclusive privileges. Thus, when a city having a general power to permit a street-railway company to lay its track in the streets, granted an exclusive right for a certain number of years, the exclusive part of the grant was held void. BREWER, J., delivering the opinion of the court, in speaking of the effect of such a power in a municipality, says "that it furnishes no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city to-day, to-morrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may to-day surrender the right of determining a score of years hence what the public may then need. The city may to-day determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to but a single company. Ten years hence its judgment may be that two railroads are needed. Where is the language in the charter which restricts it from carrying such judgment into effect by giving a like privilege to a second company? * * * When the legislature deems that public interests require that cities should be invested with power to grant exclusive privileges, it will say so in unmistakable terms, as it already has in some instances. Till then the courts must deny the possession of such powers." So, also, in *Davis v. Mayor*, 14 N. Y. 506, under a like power, the city undertook by resolution to confer upon an association of persons the exclusive right to construct and maintain for a term of years a railway in Broadway, for the transportation of passengers for profit. The court of appeals held the resolution void, and that the city had no power to make such a grant. Mr. Dillon, in commenting on this case, says that it "rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered to private parties, either corporate or natural. In this case there was no such authority, and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation, and without limit as to time, was not a license or act of legislation, but a con-

tract; void, however, because, if valid, it would deprive the corporation of the control and regulation of its streets. 2 Dill. Mun. Corp. § 716. See, also, to the same effect, *Milhan v. Sharp*, 27 N. Y. 611; *Birmingham & P. M. S. Ry. Co. v. Birmingham S. Ry. Co.*, 79 Ala. 465; *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308, 6 Am. & Eng. R. Cas. 623; *People's R. Co. v. Memphis R. Co.*, 10 Wall. 52; *Railroad Co. v. Smith*, 29 Ohio St. 291; *Cooley*, Const. Lim. 207, 208; 2 Dill. Mun. Corp. (4th ed.) 727, and cases cited; and the recent case of *New Orleans City & L. R. Co. v. City of New Orleans (La.)*, 11 South. Rep. 78.

In harmony with these authorities, and resting upon the same general principles which they announce, are the cases denying to a municipality, under the grant of power to establish and regulate ferries within their limits, the power to confer exclusive privileges or franchises for that purpose. *East Hartford v. Bridge Co.*, 10 How. 511; *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 796; 1 Dill. Mun. Corp. (4th ed.) § 114, and cases cited. So, although supplying water and light for city purposes is not recognized to be one of the most important functions of municipal government, in which private persons or corporations would not be likely to engage without some assurance of a return upon their outlay; and hence the apparent reason for permitting a city to grant exclusive privileges for such purposes. Yet by the decided weight of authority a municipality cannot, under a general power on the subject, such as the city of Salem possesses over street railways, grant to a corporation or individual the exclusive right to use its streets for such purposes. *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. Rep. 659; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 536, 16 Am. & Eng. Corp. Cas. 562; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 29 Am. & Eng. Corp. Cas. 307; *Hamilton Gaslight, etc., Co. v. City of Hamilton*, 37 Fed. Rep. 832; *East St. Louis v. Gas-light Co.*, 10 Reporter, 109; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 20 Am. & Eng. Corp. Cas. 307; *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Lehigh Water Co.'s Appeal*, 102 Pa. St. 525; *Davenport v. Kleinschmidt*, 6 Mont. 502, 16 Am. & Eng. Corp. Cas. 301; *Long v. City of Duluth (Minn.)*, 38 Am. & Eng. Corp. Cas. 415; 2 Dill. Mun. Corp. (4th ed.) § 692 *et seq.*, and cases cited. We take it, therefore, to be settled by the decided weight of authority that a municipal corporation cannot create a monopoly by granting the exclusive privilege to any person or corporation to use its streets for laying street-railway tracks, without express legis-

lative authority so to do; and this power must be plainly conferred in express words, or arise from the language used by implication so direct as to amount to the same thing. The mere general power to permit or allow the use of the streets for such purposes is not sufficient to authorize the granting of exclusive privileges.

The only cases to which we have been cited or have been able to find apparently holding a contrary doctrine are *City of Newport v. Newport Light Co.*, 84 Ky. 167, and *Des Moines Ry. Co. v. City of Des Moines*, 73 Iowa, 513, 32 Am. & Eng. R. Cas. 209, both of which have been criticised and declared to be contrary to the decided weight of authority, by BROWN, J., in *Saginaw Gaslight Co. v. Saginaw*, *supra*, and JACKSON, J., in *Grand Rapids E. L. & P. Co. v. Grand Rapids*, etc., *supra*, and are considered by Mr. McKinney, author of the article on "Municipal Corporations" in the American and English Encyclopædia of Law to be out of line with the authorities on the subject. As the charter of the city of Salem does not in express words, or by necessary implication equivalent thereto, confer upon the city the power to grant the exclusive privilege to one person or corporation to occupy its streets with a street railway, but only contains a general grant of a continuing power "to permit, allow, and regulate the laying-down of tracks thereon," it seems clear that it did not authorize the city to grant an exclusive franchise to plaintiff's assignor, and thereby disable itself from granting a similar privilege to defendant over the same streets.

It is earnestly urged that the construction of street railways necessarily requires the expenditure of a large sum of money, usually without the prospect of an immediate return, and hence private persons would not be likely to engage in such enterprises without an assurance that they would be protected from competition for a sufficient length of time to remunerate them for the outlay. This argument, which is not without force, suggests considerations of policy which might influence the legislature to grant or authorize the granting of exclusive franchises, or induce a municipality to make a franchise practically exclusive by withholding a like privilege from a competing enterprise, but a reference to the cases cited will show that it has often been urged, but without effect, when a court is called upon to construe particular legislation.

It follows that the decree of the court below must be affirmed, and the complaint dismissed.

Granting of Exclusive Privileges to Street Railway Companies.—See note, 50 Am. & Eng. R. Cas. 390; *Houston v. Houston*, C. S. R. Co. (Tex.), 50 *Id.* 380; *New Orleans City R. Co. v. New Orleans (La.)*, 50 *Id.* 391; *Henderson v. Ogden (Utah)*, 46 *Id.* 95; note, 46 *Id.* 100.

JUNCTION PASS. R. CO.

v.

WILLIAMSPORT PASS. R. CO. *et al.*(154 *Pennsylvania St.* 116.)

Occupation of Street by Street Railway—Indefinite Grant.—In the case of a legislative grant of a franchise to a private corporation, nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant; and the application of this doctrine will prevent a street-railway company, chartered by a special act in 1863, from occupying with its railway a street, the use of which was granted to another company by the municipality, under a general statute, twenty-eight years later, where the grant to the latter company was definite as to location, and that to the former company was very indefinite.

Same—Reasonable Time for Appropriating Street.—Where a grant by special act to a street-railroad company of the right to use a certain street in a borough is indefinite, the indefinite location can become fixed and definite only so far as the company has made a selection of streets and is in the actual occupation of them; and a delay of twenty-eight years, until the village has become a city, until science has substituted an entirely different motive power and until the state has granted to another company the unoccupied street sought to be taken, in clearly expressed terms, is unreasonable so as to preclude the former corporation from constructing its lines upon the said street.

Same—Legislative Rights as to Route not Determined.—If a charter is inoperative because it describes a route not authorized by the statute, under which the corporation is formed, that question can only be determined in a proceeding in which the state is a party.

MITCHELL, J., *dissenting*.

APPEAL from Lycoming court of common pleas.

Henry C. Parsons, Addison Candor, and C. Larue Munson,
for appellants.

John J. Reardon, W. W. Hart, and J. B. Krause, for ap-
pellee.

DEAN, J.—Both plaintiff and defendant are street-railway corporations under the laws of this commonwealth. The plaintiff's charter is dated April 8, 1892, and was issued under the general act of May 14, 1889. The defendant was incorporated long before, under special act of April 15, 1863. Both have authority to construct and operate street railways in Williamsport. The plaintiff, by its charter, is authorized to occupy and operate its railway on Market street as follows: "Beginning at the intersection of Market and Hepburn streets, and thence southwardly through Mar-

Case stated.

ket street, in said city, to the southerly line of the city." The defendant's charter, being the act of 1863, under which it is incorporated, specifies its right as follows: "Said company shall have power to lay out and construct a railway, commencing at Third and Market streets in the borough of Williamsport, and continuing westwardly along Third street, or any other street in said borough, to the village of Newberry, in said county, and eastwardly through said Third street or streets in said borough, as may be deemed advisable by said company, to and through the borough of Montoursville, with the right to construct branches to the main track of said passenger railway through any of the said streets of this borough of Williamsport, with single or double track." It will be noticed that, regard being had to the general direction of each railway, as pointed out in their charters, there would not necessarily be any antagonism or rivalry between them. The plaintiff is to run north and south, the defendant east and west. When plaintiff obtained, on the 8th of April, 1892, from the commonwealth, the right to lay its track north and south on Market street, there was not a rail upon it, except where defendant crossed it at Third street. It was open, and its unoccupied appearance invited appropriation. On the 14th of April, 1892—six days after plaintiff's charter was issued—defendant commenced work on Market street, at different points, with a view of laying its rails on the ground described in plaintiff's charter. Whether the intention was to exclude plaintiff from the street, or to in good faith construct and operate its own railway thereon, is not material, if plaintiff has the superior right, for this right cannot be exercised if the defendant continues its work. When the work was commenced plaintiff filed this bill, averring its right to Market street, denying that of defendant, and praying for an injunction. Defendant answered by averring its own prior right under the grant in special act of the 15th of April, 1863, and further denying plaintiff's right to the corporate power it claimed, because, as it alleged, the route as set out in its charter did not constitute a complete circuit—an essential requirement, without which there could be no lawful organization under the general act of 1889.

A preliminary injunction during pendency of suit was awarded, and J. F. Strioby, Esq., was appointed master to take testimony, find facts, and suggest final decree. The material facts as found by the master are: (1) Defendant commenced the work of excavation on Market street on the 14th of April, 1892, and was proceeding with it when stopped by the preliminary injunction; (2) that up to that date no track of a railway had been laid upon the street, or work done upon

it with that intention; (3) that the work being done by defendant would effectually prevent plaintiff from occupying the street as described in its charter; (4) that defendant had commenced work on Third street in 1864, and in subsequent years had largely increased its trackage, principally in an east and west course, the variations being only for short distances, to give it a more eligible route in one or other direction; (5) that in 1891 it had substituted electricity for horse power; (6) that the route described in plaintiff's charter was not a circuit in the sense that a starting-point could be again reached by travelling the entire length of the railway on a separate roadbed, but to reach such starting-point the same rail must be run over back again; (7) at date of defendant's franchise, in 1863, Williamsport was a borough with a population of about 4000; that in 1892 it had become a city with a population of about 35,000. As matters of law he concludes that from the description of defendant's grant, as applied to the streets named in it as they then existed, and from the course of Market street, defendant never had a right to occupy Market street; that the construction of its railway, from the plain import of the description in the act of assembly, was to be eastwardly and westwardly from the intersection of Third and Market, and the implication of a right to go north and south on Market is not warranted by either the language of the description or the circumstances connected with the location and operation of the railway; that the words, "the right to construct branches to the main track of the said passenger railway through any of the said streets," means only streets theretofore mentioned in the description, as Third street, or any other street running westwardly to Newberry, or Third street, or any other street running eastwardly to Montoursville, and that by no reasonable implication could Market, a north and south street, be meant. He further concludes that the word "circuit" in the act of 1889 does not mean a complete or geometrical circuit, but that it was used as synonymous with "course" or "route." Therefore he suggests that defendant be perpetually enjoined from laying its track upon or occupying Market street from its junction with Hepburn street southwardly to the city line. On full hearing before the court on exceptions to the master's report, it was, on February 4, 1893, approved, and the preliminary injunction was made perpetual; the court in its decree adopting and reaffirming a very full opinion, filed when the preliminary injunction was awarded on the 11th of May, 1892. From this decree the defendant took this appeal.

Defendant's argument sets out very clearly and broadly the powers and rights claimed by it under the act of 1863. If

sustained, the injunction restraining it from occupying Market street ought not to have been awarded; if not well founded the decree should be affirmed. Its claim may be thus condensed: "Under a fair interpretation of its grant under the act of 1863, it confers on defendant the right to lay its rails on any of the streets of Williamsport." The value of such a right to a private corporation in a growing city like Williamsport must be very great, and ought not to be disturbed if clearly sanctioned by law. The consequences in admitting it, however, are very grave to the city as well as to this plaintiff. If the right has its existence in the act of 1863, then the company, in its exercise, is altogether free from the control of the city authorities, except in those immaterial particulars specified in the act. Without the consent of the city the defendant can, for all time, appropriate for the use of the railway any of its streets. The city is, so far as concerns the use of its streets, by a law of the commonwealth delivered over to a private corporation, having no other interest, perhaps, except that of collecting fares from passengers. Its assertion is that under a special act of the legislature in 1863 it was endowed with the right to construct in Williamsport, on any street or streets eastwardly and westwardly, without limitation as to time, a passenger street railway, with branches on all cross-streets. That, although at the date of the grant Williamsport was a small borough of 4000 people, yet that now, 28 years after, when it has become a city of 35,000 people, with greatly enlarged territory, and its form of municipal government changed, it has the same right to the streets of the city as it had to those of the borough in 1863.

It is perhaps too late to inquire whether the legislature, under the obnoxious system of private legislation, before the adoption of the constitution of 1874, could do this, but it is not too late to inquire whether in this instance it has done so. In this inquiry we start with the principle, even then old, declared by this court in 1855, in the construction of a grant to a private corporation through public property, in *Allegheny City v. Ohio & P. R. Co.*, 26 Pa. St. 358: "Nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant." This doctrine has been repeatedly announced in a large number of cases since. In *Bank of Pennsylvania v. Com.*, 19 Pa. St. 152, we held that, unless this doctrine be strictly adhered to, "the legislature, without knowing or intending it, might be induced to disarm the state of the most necessary powers, and transfer them to corporations. The continued existence of

Claims of defendant.

Legislative intent—Construction of grants.

a government under such circumstances would not be of much value. There is no safety to public interests except in the rule which declares that the privileges not expressly granted in the charter are withheld." Again, in *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339: "A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation." In this case, on the 8th of April, 1892, under the general act of 1889, the commonwealth granted by plain words to the plaintiff the right to occupy one particular street with a street railway, specifying the points of beginning and ending, and, while granting this right, the exercise of it is made to depend on the consent of the city. Six days afterward it is met by the defendant with a denial of the right of the state to grant to plaintiff or any other corporation the street for such purpose, because the same sovereign had already in 1863 made a grant to it of the same street for the same purpose; and, this being the prior grant, it renders valueless the later one. Where are the indubitable words of this first grant, which gave to the defendant this street? The plaintiff's grant being definite as to location, it will prevail, unless defendant's to the same location be definite.

We assume, with the court below, that defendant's right to occupy Third street, or any other street running eastwardly and westwardly to its terminal-points, is definite as to location; but, according to defendant's own view, the right to construct branches to this definite location of its main line was wholly indefinite as to location of the branches. Not a single street was named, nor were any words used certainly designating them. Follow to its legitimate conclusion the defendant's claim in its own words, as stated in paragraph 3 on page 58 of the paper book, and see to what consequence it leads: "A fair interpretation of the grant makes it confer the right to construct branches on any of the streets of Williamsport." That is, if there be no time within which the streets are to be designated, then "any" necessarily includes "all." If it have the right to all for all time, then no other railway can ever have the right to any street. Defendant may or may not occupy the streets, but, if it do not, its prior, and therefore superior, right excludes all others. That such a right, altogether doubtful in its exercise, should extend forever to all the streets running north and south, cannot be based on any reasonable interpretation of the act. If the legislature intended to confer such a power of indefinite location, without limit in duration, it should have said so in plain words. No court, under any rule applicable to grants of rights to private

Doubtful
specifications
of grant.

corporations as against the public, will imply such a scope to the words used. The manifest implication from the language is the right to select and occupy streets with branches within a reasonable time. No branch streets are specified; these must be specified by the defendant by occupancy. It may take many, few, or none; but, if it does take any, it must point them out by unmistakable acts. When it actually occupies them, then the grant, certain as to power to take, is no longer doubtful as to location.

What was a reasonable time to make certain the uncertainty in this grant by a selection of branch streets? We have no hesitation in holding that a delay of 28 years, until the village had become a city, until science had substituted an entirely different motive power, and until after the state had granted this unoccupied Market street in clearly-expressed terms to another corporation, is too late. Defendant's indefinite location has become fixed and definite, so far as it has made the selection of branch streets, and is in the actual occupancy of them; and, while no subsequent grant by the state, under the act of 1889, will be effectual to disturb it in the operation of its railway where built, its power to go on defining what streets it will take has ceased. The state has a right to presume, and the presumption is conclusive, that after this lapse of time defendant has taken all it desired under the grant, and all it had the right to take. As to future appropriations of north and south streets, they can only be made under the laws applicable to corporations of a like character.

Reasonable
time within
which to exer-
cise powers.

In opposition to this view we are confronted with the opinion of this court in Williamsport Pass. Ry. Co.'s Appeal, 120 Pa. St. 1, 36 Am. & Eng. R. Cas. 125, which is cited and relied on as, in effect, an adjudication of this contention. That case does not touch upon this issue passed upon in the court below or here. The question there was whether, to exercise the express right conferred by the act of 1863 in the extension of its road east and west, the defendant must have the consent of the city council. This court held that the work then being done was under the express authority of the charter. Chief Justice PAXSON, in the very first words of the opinion, says: "It is not denied that the charter of the appellant company gives it the power to lay its tracks upon the streets in question; and, if it were denied, it would not matter, as such power is expressly conferred." He had in his mind the power to run westwardly to Newberry and eastwardly to Montoursville. This was not denied then, nor is it denied now. It was decided that the express power thus con-

ferred of running east and west to its terminal-points was not abridged or taken away either by the constitutional amendments of 1857, the new constitution of 1874, or the general legislation subsequent thereto. That case was rightly decided on the single question then before us. Here the power to appropriate north and south streets under a power to appropriate east and west streets is denied. The court below holds that neither expressly nor by fair implication from the words of the grant, has the defendant the right to occupy Market street. We affirm the decree, not only for these reasons, but for the additional one that the grant of any streets not leading in the direction of its terminal-points was wholly indefinite, only to be made definite by their occupation under the grant within a reasonable time, now passed; and that any further occupation by defendant of north and south streets must be accomplished with the consent of the city, under the general legislation applicable to street railways in this commonwealth.

As to the assignment of error that plaintiff's route does not describe a circuit under the act of 1889, and for that reason it can exercise no corporate power to construct its railway, we are of opinion that, as the state authorities, in their understanding of the meaning of the term "circuit," issued a charter specifying the straight line of a north and south street as the route of the proposed railway, we ought not in this proceeding, in which the state is no party, to render a judgment which would in effect revoke the charter. If the charter is inoperative because it described a route not authorized by the act of 1889, that question can be most effectively determined in another form of proceeding.

The decree of court below is affirmed, and appeal dismissed, at costs of appellant.

MITCHELL, J., dissents.

Laches of Street Railway Company in Constructing its Road over Routes Granted.—See *People v. Broadway R. Co.* (N. Y.), 48 Am. & Eng. R. Cas. 692.

HUDSON RIVER TELEPHONE CO.

v.

WATERVLIET TURNPIKE & R. CO.

(185 *New York*, 393.)

Right of Street Railway Company to Change Motive Power.—Under a grant to a street-railway company of authority to use "the power of horses, animals, or any mechanical or other power, or the combination of them, which the said company may chose to employ, except the force of steam," the company has the right to substitute electricity as a motive power, when the city within which its lines are located has granted its consent to the change under its general power to regulate the use of streets by railways.

Same—Telephone Company Cannot Complain of Damage by Electric Current.—Where a telephone company was granted the right to use a certain street upon the express condition that its lines should be so constructed as not to interfere with the operation of a street railway, already established upon the said street, it was not entitled to relief from injuries sustained by reason of the derangement of its electric currents, caused by the proximity of its wires to the trolley-wires of the railway company, or by reason of the return current affecting its underground connections on account of the conductivity of the earth, the public convenience in the use of the street being a first consideration.

Same—Paramount Rights of Public in Use of Street.—Where the telephone company had accorded to the public use, by the manner in which it elected to use its franchise, the unrestricted right of passage, it could not question the form in which such right should be enjoyed, so long as it was of lawful origin and was utilized with proper care and skill; and the defendant's mode of conveying its passengers being of this character, the plaintiff could not justly complain of the loss which it unavoidably suffered on account of the particular manner in which the defendant chose to propel its cars.

ACTION for an injunction to perpetually restrain defendant from operating its street railroad by the single-trolley system of propulsion.

APPEAL from supreme court, general term, third department.

John S. Wise and *Marcus T. Tinn*, for appellant.

E. Countryman and *John A. Delehanty*, for respondent.

MAYNARD, J.—All the injuries of which the plaintiff complains are due to the adoption by the defendant of the single trolley system of electric propulsion. It becomes, therefore, of the first importance to determine whether this change of motive power was authorized by law. The plaintiff makes a vigorous attack upon the right of the railway company to the enjoyment of such a franchise, and urges many grounds

Authority for
change of
power.

in support of its position. We cannot assent to the argument of the learned counsel for the defendant, that the determination of this question is immaterial, because the state alone, by its attorney-general, can bring suit for a usurpation of corporate powers, or because, ordinarily, the local authorities must prosecute for an unlawful obstruction of the streets, not involving the appropriation of private property. In the case of a corporation exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are *ultra vires*, or which are equivalent to a confiscation or condemnation of the property rights of the citizen, unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it must respond to the plaintiff, and to all others whose lawful pursuits are invaded by its illegal procedure. But we think it is clear that under the act of 1862 (chapter 233)¹ and the ordinances of the common council of the city, the defendant was invested with the authority to adopt this method of transportation, and to place in the streets in question the apparatus and fixtures necessary for its practical and efficient use. The choice of a motive power is not expressly limited in the statute, except by the exclusion of the force of steam. It is not impliedly limited, except that the power selected must not be of such a kind, or require such a mode of application, as will make it a public nuisance, or render the passage of the streets unsafe or dangerous for travellers availing themselves of the ordinary means of locomotion.

The report of the referee removes all doubt with reference to the safety and practical usefulness of the system adopted by the defendant. He finds, in substance, that it is the most efficient and economical, and the best thus far devised, and less liable to accidents through the displacement of machinery than any other trolley system; that it subserves the public interests, and satisfies the public wants with respect to transportation; that it is not prejudicial to the public

Motive power
may be
changed with
advances in
science.

¹ Laws 1862, c. 233, provide that the defendant may use "the power of horses, animals, or any mechanical or other power, or the combination of them, which the said company may choose to employ, except the force of steam."

health or dangerous to human life ; and that no other system of electric propulsion of cars has thus far been demonstrated to be as practicable, effective, and advantageous, both to the public and to private interests, as the overhead, single-trolley system. As the evidence is not contained in the record, these findings must be deemed to have been supported by competent proofs, and they leave no room for the contention that the use of this system is unsafe or dangerous, or in any degree a public nuisance. The act of 1862 cannot properly be limited to such methods of operating street-surface railways in cities as had then been invented and were then in actual use. The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing, modes of operation. Electricity, as a natural and applied force, was then well known, and it is reasonable to infer that its adaptation as a propelling power was even then anticipated. It would be an unjust reflection upon the wisdom and intelligence of the lawmaking body to assume that they intended to confine the scope of their legislation to the present, and to exclude all considerations for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage rather than to embarrass the inventive and progressive tendency of the people. The application by the defendant for this new grant of power must have reminded the legislature that in thirty years its original franchise of a turnpike way had proved inadequate for the wants of a thickly populous community, and it could not have failed to perceive that in a like period of time the operation of street cars by horse-power might become obsolete or undesirable. It therefore wisely provided for the occurrence of such an emergency.

It is not to be denied that it is a sound rule of statutory construction which permits nothing to be taken in a grant of corporate powers that is not plainly expressed or unequivocally given, or not demanded by necessary implication. The defendant claims nothing more ; but the plaintiff endeavors to cut down the franchise bestowed by eliminating from the statute the general words of the grant. As in 1862 these railways were run exclusively by animal power, the provision in section 4 of the act, which authorizes the defendant to adopt any mechanical or other power, or the combination of them, which it might choose to employ, except steam, was superfluous, if its range of selection is to be confined to the motive

forces which had then been discovered and employed. The history of plaintiff's franchise is instructive upon this point. It is an intruder in the public streets, and not possessed of any property rights which a court of equity can be invoked to protect, if the canon of construction which it insists upon applying to the grant of the defendant's franchises shall be allowed to prevail. It is incorporated under the act of 1848 (chapter 265), providing for the formation of telegraph companies. At that time, and for 20 years afterward, the art of telegraphy, as known and practised, did not include the transmission of human speech by means of the telephone over wires strung upon poles. But it has been held in other states and countries, and, as we think, rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. *Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 8 Am. & Eng. Corp. Cas. 538; *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 42 Fed. Rep. 273; *Attorney-General v. Edison Tel. Co.*, 6 Q. B. Div. 244. It would also be a narrow and illiberal construction of the statute to hold that the defendant was irrevocably bound by the choice of a motive power made in 1862. It then selected the only practicable one; but the authority to employ others was not thereby exhausted. It was a continuing privilege, and was intended to be potential whenever and as often as the means of public travel might be improved or facilitated by its exercise. Equally flexible was the power given to the common council of the city to impose such reasonable conditions upon the enjoyment by the defendant of the franchises of a street-railway company as in their judgment the interests of the public seemed to require. Their authority in this respect was coincident in extent with the company's right of selection. They could limit the municipal assent to a railroad operated in a specified way, as they did by the ordinance of 1862, and while that remained unmodified no other method could be lawfully used, and they could, by a subsequent ordinance, as in 1889, authorize the necessary changes to be made in the equipment of the streets for the introduction of electricity as a propelling force. This power is fairly inferable from the original act, and may also, perhaps, be deduced from the provisions of the city charter, which authorize them to regulate the use of the streets by railways.

This case is clearly distinguishable from that of *People v. Newton*, 112 N. Y. 396, cited at length by plaintiff's counsel. There the railroad company had no express grant of legis-

lative authority, and the consent of the municipality was refused. It attempted to override the local authorities and compel them by *mandamus* to give their approval to the opening and excavation of the streets for the purpose of substituting a subsurface mode of operation, when the granting of the permission plainly involved the exercise of judgment and discretion. It was held that under such circumstances the department of public works could not be coerced to act favorably upon the company's application. But the case is not authority for the broad proposition for which the plaintiff contends, that where the right to select a motive power is expressly given, and is not limited either as to time or kind, and a selection has been made with the approval of the city authorities, the company cannot subsequently adopt a new and better system of propulsion upon obtaining the municipal consent thereto. The defendant was not subject to the provisions of section 12 of the street-surface railroad act of 1884 (chapter 252), as amended by chapter 531, Laws 1889, requiring the approval of the railroad commissioners, and the consent of the owners of one half in value of the property abutting upon the streets. It had the right to make the change under the act of 1862, upon obtaining the consent of the common council, and hence it is embraced within the saving clause contained in section 18, which declares that the act of 1884 shall not interfere with, repeal, or invalidate any rights theretofore acquired under the laws of the state by any horse railroad company, or affect or repeal any right of an existing street surface railroad company to construct, extend, operate, and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof. Inchoate as well as perfected rights are saved by such a provision. *New York Cable Co. v. Mayor, etc.*, 104 N. Y. 1.

The defendant's authority to use electric motors in the propulsion of its cars in the streets of Albany, and to operate them by the single-trolley system, cannot therefore be successfully questioned, and, unless some actionable damage has resulted, or will result, to the plaintiff therefrom, its complaint was properly dismissed by the trial court. There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public

highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use, to which they were originally devoted. The condition contained in the plaintiff's grant would have been implied, had it not been expressly named. The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skilfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable. A different rule prevails if there has been an encroachment upon private rights, to the extent of an appropriation of private property, and it was upon this ground that the decision in the Elevated Railroad Cases was placed. *Story v. Railroad Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596; *Lahr v. Railroad Co.*, 104 N. Y. 268. It was there held that an abutting owner has an easement of light, air, and access in the street in front of his premises, of which he cannot be lawfully deprived, without compensation, by the erection and use of an elevated railway structure. But the plaintiff has no easement in the public streets. It is there by virtue of a legislative grant, revokable at the pleasure of the power which made it, constituting, while it continues, a valuable franchise, which is recognized as property in the fullest sense of the term. *People v. O'Brien*, 111 N. Y. 1, 36 Am. & Eng. R. Cas. 78. The plaintiff's title to this property is, however, encumbered by a condition which diminishes its value, and it cannot rightfully complain of the burden which it has voluntarily assumed. It is a part of its compact with the state that the maintenance of its lines of communication shall not prevent the adoption by the public of any safe, convenient, and expeditious mode of transit, such as the defendant's system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it existence.

These considerations necessarily dispose of one of the grounds upon which the plaintiff claims to be entitled to relief from the special injury sustained by the acts of the defendant, namely, the derangement of the electric currents upon its lines of wire by means of induction, as it is called in electric dynamics. It seems to be indispensable to the successful prosecution of the plaintiff's business that it should make use of an exceedingly weak and sensitive current of

electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current, which renders the operation of the plaintiff's telephones at all times difficult and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous, and less useful and efficient. It is obvious that to require such change to be made would be to grant to the plaintiff by a decree of the court that which the legislature has expressly and intentionally withheld.

But the plaintiff is exposed to another danger which deserves consideration. Its system of communication is only partially established in the public streets. Its telephones are located upon the premises of its subscribers and patrons, and at a central exchange, which is upon private property. Its instruments are connected by branch-wires with the main wires suspended upon the poles in the streets. To render their respective plants available, both parties must have a return electric current, and both use the earth for that purpose. The plaintiff grounds its wires upon private property, and in many cases connects them with the gas and water pipes, and in this way establishes and completes its required circuit. It is immaterial whether its wires are grounded upon its own property, or that of others who permit the plaintiff to so use their premises. Its possession as a licensee would be lawful while the license continues. The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as "conduction." The defendant insists that it has an equal right with plaintiff to make use of this property or law of nature in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true.

But the defendant does something more. It does not leave the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person, even

in the prosecution of a lawful trade or business upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which the plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current, in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form, but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects for pleasure or profit the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon it or him the same duty which is exacted of the owner of the accumulated water, power—that of providing artificial conduit for the artificial product, if necessary to prevent injury to others. But the record before us does not require a determination of the question in this form. The use which the plaintiff is making of its grounded wires is a part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there under the permission of the state, and is subject to the condition that it shall not incommode the use of the streets by the public. It is one indivisible franchise, and is in its entirety subservient to the lawful uses which may be made of these

Damage by
discharge of
electricity
through earth
—Liability.

thoroughfares for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction.

In the disposition of this appeal, there has been no occasion to make any application of the rule that where a public use authorized by law takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages. *Radcliff's Ex'rs v. Mayor*, 4 N. Y. 195; *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Moyer v. New York Cent. & H. R. R. Co.*, 88 N. Y. 351, 8 Am. & Eng. R. Cas. 531; *Uline v. Railroad Co.*, 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252. Under such a rule it would be a grave question whether injuries to which the plaintiff is subjected would not, if made permanent, constitute a servitude upon its property which could not be imposed without compensation, provided the parties were occupying the streets upon an equal footing. As was said by Judge ANDREWS in *Cogswell v. Railroad Co.*, 103 N. Y. 14, 27 Am. & Eng. R. Cas. 376: "It is, in many cases, difficult to draw the line and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy." We are spared the task of discrimination in this case by reason of the legal attitude which the plaintiff has assumed in its occupation of the streets. It has accorded to the public, by the manner in which it has elected to use its franchise, the unrestricted right of passage, and it cannot question the form in which such right shall be enjoyed, so long as it is of lawful origin, and is utilized with proper care and skill. The defendant's mode of conveyance of passengers is of this character, and the plaintiff can no more justly complain of its loss from this source than it could if, by the jarring of loaded vehicles passing up and down Broadway, its delicate and sensitive instruments were displaced, and their beneficial use impaired or destroyed.

There is also an appeal by the defendant from an order denying a motion for an extra allowance of costs. The decision of the court below was placed upon the ground of a want of power, and the special reason assigned was "that the action being to restrain the defendant from employing a particular system only, and over a part only of the road, the franchise was not involved, and there is therefore no basis on which an allowance can be estimated." In denying the motion for this sole cause, we think the supreme court erred. The subject-

matter of the controversy litigated was the right of the defendant to use the single-trolley system in the operation of its road upon Broadway and South Ferry street, and the prayer for relief in the complaint is that an injunction issue "restraining the defendant from operating its said railroad through the city of Albany by the electric system herein described." If the right thus sought to be perpetually enjoined has a money value, and there was any evidence in the moving papers tending to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion, and dispose of the application upon its merits. We have examined the record sufficiently to satisfy us that there was some proof of this character. One witness testifies that the right of the defendant to run its cars by electric motors upon the single-trolley system in the city of Albany is worth to the company the sum of at least \$300,000, and as against the double-trolley system, or any other known system, at least \$76,000. We are not permitted to say how much this and other similar evidence may be worth. We are dealing exclusively with a question of power. Whether there shall be any allowance at all, or what the amount of it shall be, and how far the hardships of the plaintiff's situation shall affect the allowance, if at all, are questions primarily to be considered by the special term, and can be safely intrusted to its determination. The authorities cited in the opinion of the general term were all cases where no evidence was presented as to the commercial value of the right or franchise in question, and the decision was that, in the absence of such evidence, it could not be presumed to have a particular value. The just inference from them is that, if such proofs had been submitted, the court might have considered them as the basis of an allowance. *People v. Genesee V. C. R. Co.*, 95 N. Y. 666; *Conaughty v. Bank*, 92 N. Y. 401, 1 Am. & Eng. Corp. Cas. 596; *Heilman v. Lazarus*, 12 Abb. N. C. 19.

The order of the general term granting a new trial must be reversed, and the judgment entered upon the report of the referee affirmed, with costs in all courts. The order denying the motion for an additional allowance must be reversed, with costs, and the motion remitted to the supreme court, to be there heard upon its merits. All concur.

Electric Street Railways.—See extended note, 50 Am. & Eng. R. Cas. 416.

Use of Trolley System not Restrained.—In *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* (Ky., Oct. 24, 1893.), 23 S. W. Rep. 592, it was held that the operation of an electric street railway by the overhead wire system was not so dangerous as to authorize its restraint by injunction.

Respective Rights of Trolley and Telephone Companies.—In *State v. Janesville St. R. Co.* (Wis., Jan. 30, 1894.), 57 N. W. Rep. 970, it was held

that a telephone company whose business is established, and whose wires are strung in the streets by license of the city, may have *mandamus* against a street-car company, thereafter licensed to use electric power on the same streets, to compel it to obey an ordinance requiring it to string guard-wires where its trolley-wires cross other wires, so as to prevent damage by breakage, on a showing that the relator is in special danger as to the life of its servants and the integrity of its property in case of such breakage, that breakage cannot be prevented altogether, and that guard-wires are the approved and only safeguard. The court said: "If a municipal corporation has not the inherent provisional or police power to pass ordinances to regulate or restrain the use of such a dangerous agency within the corporate limits, it certainly cannot have such power for any purpose. It is claimed that said ordinance has only future operation or effect. In application to the case, section 7 of said ordinance provided: 'Whenever it shall be necessary to cross * * * telephone-line or lines or any wires used, etc.' Has it not been necessary for the defendant company to cross these telephone-lines or wires of the relator since the passage of the ordinance, and is it not now necessary to do so? Then the ordinance, by its terms, is applicable to this case. The ordinance is made to regulate existing things, and things which continue to exist, as the wires of the defendant cross the wires of the relator. Whenever at any time wires so cross, this safeguard must be applied. The ordinance has a present and future effect. It is said these wires crossed before the ordinance was passed. That is true, and they have continued to cross ever since, in violation of the ordinance. The ordinance does not prohibit the crossing of such wires. It provides the remedy for it as an existing evil, and requires safeguards to be so placed as to avoid the danger to persons and property. It is not retroactive in any sense. First. The ordinance is reasonable, because it requires that to be done which in law and good conscience the defendant ought to do for the protection of the relator, whose established business it has endangered and disturbed. Second. It is clearly sustained under the police power of the city. 'The test is whether it is designed and tends to protect some public or private right from the injurious act of the company; as when it prohibits the running of the cars of one company on any street so near the depot of another railroad as to interfere with safe and convenient access to the latter road.' Tied. Lim. 597-599. The statute of New York, requiring telegraph, telephone, and electric fires to be placed underground in streets in certain cities (chapter 499, Laws 1885), was upheld in *People v. Squire*, 107 N. Y. 593; *W. U. Tel. Co. v. Mayor, etc.*, 38 Fed. 552. The right and authority in a city 'to regulate, control, and prohibit the location, laying, use, and management of telegraph, telephone, and electric-light and power "wires and poles," * * * in order to guard and secure the public safety and convenience,' is upheld in *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 8 Am. & Eng. Corp. Cas. 538. Ordinance to regulate street railways is upheld in *State v. Madison St. Ry. Co.*, 72 Wis. 612, 36 Am. & Eng. R. Cas. 135, and in *State v. Hilbert*, 72 Wis. 184, 36 Am. & Eng. R. Cas. 118. Cities can regulate the placing of electric wires in the streets. *Keasbey Electric Wires*, 38; *Van Hook v. City of Selma*, 70 Ala. 361, 2 Am. & Eng. Corp. Cas. 23; *Mutual Union Tel. Co. v. City of Chicago*, 16 Fed. 309; *Delaware, L. & W. R. Co. v. East Orange*, 41 N. J. Law, 127; *W. U. Tel. Co. v. City of Philadelphia* (Pa. Sup.), 12 Atl. 144; *Telegraph Co. v. Town of Harrison*, 81 N. J. Eq. 627; *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37; *Sioux City St. Ry. Co. v. Sioux City*, 11 Sup. Ct. 226. There can be no question, at this late day, but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street, and require all reasonable safeguards for the same. The question is virtually so settled in this state by our own decisions. The

relator is entitled to sue out the writ of *mandamus* to compel the defendant to properly place such guard-wires as the proper safeguard in such a case to protect its rights and safety. The relator is especially interested in the defendant's performance of this public duty. It is admitted to be true that such guard-wires so placed are the very best and most approved method of safeguard in such case. This, then, is a clear legal right to be enforced by *mandamus*. *Marbury v. Madison*, 1 Cranch. 137; *Railroad Co. v. Hall*, 91 U. S. 343; *People v. Chicago & A. R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352. There is no adequate remedy in such a case, except by the writ of *mandamus*, to compel the respondent company to do what it is clearly right for it to do, and that the relator has the right to compel it to do. The penalty enforced would not cure the mischief. *Rex v. Barker*, 3 Burrows, 1266; *Scott & J. Tel.* § 78; *High, Extr. Rem.* § 320; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. Ry. Co.*, 67 Ill. 118; *Ohio & M. Ry. Co. v. People*, 121 Ill. 483, 30 Am. & Eng. R. Cas. 427; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Uniontown v. Com.*, 84 Pa. St. 293; *Howe v. Commissioners*, 47 Pa. St. 361; *Queen v. Trustees Luton Roads*, 1 Adol. & E. (N. S.) 860; *Cambridge v. Railroad Co.*, 7 Metc. (Mass.) 70; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269; *State v. Northeastern R. Co.*, 9 Rich. Law, 247; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *State v. Wilson*, 17 Wis. 687; *State v. Richter*, 37 Wis. 275; *State v. Supervisors of Wood Co.*, 41 Wis. 28; *State v. Chicago, M. & N. R. Co.*, 79 Wis. 259; *Overseers of Porter Tp. v. Overseers of Jersey Shore*, 82 Pa. St. 275. It is said that no such damages have yet accrued. The relation very clearly shows that such damage is imminent and threatening, and the danger is all the time present. This might be sufficient ground for an injunction to restrain the defendant from crossing the wires of the relator with its wires—a much more violent remedy. The relator does not seek to prohibit such crosses, but only to make them safe. The relator is conducting its telephone business under constant fear and apprehension. Must it wait until the full extent of the apprehended consequences have been realized? The remedy sought is clearly the proper one." See, also, note, 50 Am. & Eng. R. Cas. 419.

Street Railways—Motive Power—Special Legislation—Constitutional Law.—In *Reeves v. Continental R. Co.*, 152 Pa. St. 154, it was held that a statute which provides that passenger railways in cities of the first class may use other than animal power when authorized by city councils, and repeals all limitations contained in charters of passenger-railway companies, restricting them to the use of horse power, is not local or special legislation within the inhibition of the constitution.

SAGINAW UNION ST. R. Co.

v.

MICHIGAN CENTRAL R. Co.

(91 *Michigan*, 657.)

Street Railway Company—Action for Trespass—Cutting Trolley-wires—Damages.—Where a street-railway company, authorized by a city to change its motive power to electricity, strung trolley-wires across the defendant's railroad tracks at a height of nearly 20 feet, offering to have them raised to the height of 22½ feet, which was the standard height for bridges above the railroads of the state, the defendant company was liable for all damages resulting from its act in cutting away the wires above its track, although it had notified the plaintiff that it would not allow the wires to be strung at a less height than 24 feet, which was the height fixed by the railroad commissioner.

Measure of Damages.—Where the evidence showed that there was ample time while the motive power of the plaintiff was at rest, and its cars were not running, to have removed these wires, the removal of them at a time of day when it involved great loss to the plaintiff and great danger to human life, made the defendant company a trespasser, *ab initio*, and liable for all damages, including the value of a new armature which the plaintiff was compelled to secure for use in its dynamo.

ERROR to Saginaw circuit court.

Hanchett, Stark & Hanchett (*Ashley Pond*, of counsel), for appellant.

L. T. Durand (*Wisner & Draper*, of counsel), for appellee.

MORSE, C.J.—The Michigan Central Railroad Company operates its road across Genesee and Washington streets, in the city of Saginaw, upon the track of the Detroit & Bay City Railroad Company, which latter company has had the right of way across these streets by grant from the city of East Saginaw since the year 1878. The Saginaw Union Street Railway, then operating its road by horse-power, in December, 1889, changed its operating power to electricity, by permission of the city granted by ordinance. It saw fit to use the trolley system. It placed the trolley-wires across the defendant's tracks on Genesee and Washington streets. At Genesee street the overhead wire was placed 19 feet 9½ inches above the defendant's track-rails; at Washington street, 19 feet 6 inches above such rails. On the 16th day of May, 1890, while the plaintiff was in the full operation of its road and running its street cars, the defendant company cut the wires of plaintiff where they crossed its tracks on Genesee and

Case stated.

Washington streets. For this act the plaintiff brought this suit in trespass, and recovered a verdict and judgment for \$933.03.

The defence to this action was, in substance, that in operating the defendant company's road it was necessary to pass under these wires cars from 12 to 14 feet and 3 inches in height from the tracks, and cars loaded with lumber to the height of 15 feet; that it was necessary to have brakemen standing upon the top of these cars to signal the engineer and for other purposes; and that, under these necessities, the wires of plaintiff were not placed at a sufficient height from the ground so that defendant railway could be operated in the usual manner, with safety to its employes. That February 11, 1890, John T. Rich, then state railroad commissioner, issued an order to the general managers and superintendents of Michigan railroads, instructing them not to permit the erection or maintenance of the wires of electric-street railways at a less distance above their tracks than is allowed for bridges and other obstructions not suitably guarded, and that this distance should not be less than 24 feet above the track. April 12, 1890, W. A. Vaughn, division superintendent of defendant, notified the plaintiff, by letter, that its wires were less than 24 feet above defendant's tracks, and of the railroad commissioner's order, and asked plaintiff company to comply with such order. April 15, 1890, the president of plaintiff company replied to this letter that it was its intention to have its wires 22 feet 6 inches above the track at steam-railway crossings, being advised that such height was sufficient, and was the standard for railway bridges. This letter Mr. Ledyard, president of the defendant company, answered by letter of May 3, 1890, stating that such company would not permit the wires of plaintiff to be strung across its tracks at the height of 22 feet 6 inches, and further wrote: "I am constrained to advise you that if by May 15, 1890, the wires of your company, wherever they may cross the right of way of this company, or any of its leased lines, are not placed at the height of 24 feet, this company will proceed to remove the same from its right of way." Nothing further being done by the plaintiff company, the defendant cut the wires of plaintiff at these two street-crossings about 4 o'clock P.M., May 16, 1890.

The circuit judge instructed the jury as follows, after stating the circumstances of the case, and the claims of the respective parties: "Gentlemen of the jury: It appears from the testimony in this case that the wires of the plaintiff were cut at four o'clock in the afternoon, during a busy hour, when the plaintiff's road was in full operation, when all the dynamos were at work, when the

cars were all running, in broad daylight, and while people were travelling to and fro. It appears that the effect of the cutting was to stop all the cars throughout the city at every point where they were at the time the cutting occurred. There was no further current, no further motion, no further power, on any of the cars. This interfered with the public travel and business; it interfered with the general public; it was a stoppage of the entire business of the road, and the transportation of passengers at that time; it left every man upon every car right at the point where he was when the wire was cut, to go as best he may to his destination. The effect of the cutting at that time, as disclosed by the testimony, was to injure the machinery—create what is known, in electrical terms, as a ‘short circuit.’ It also appears from the testimony in the case that in cutting the wire, unless some person stood there to protect people on the street, that there might possibly be danger even from the wire that had been cut. The charge of the court is: That if the plaintiff neglected or refused to place its wires at a certain height over the defendant’s track, so as to enable it to carry on its business in a proper way, the way that it had a right to carry it on, that the defendant would have a right to raise the wires to the proper height, or remove the wires from its right of way; but in doing this the defendant was required to choose such a time and under such circumstances as would do no damage to the property of the plaintiff, nor damage to the general traffic of what is really a public institution. And the defendant was bound to inquire and ascertain whether attempting to remove the wires at such time and under such circumstances would have any such tendency. The railroad company were bound to inform themselves of that fact before they attempted to abate what they considered a nuisance to the operation of their road. I therefore charge you, as a matter of law, that the cutting of the wires at the time they were cut, and, under the circumstances, the attempt to remove them at that time, was unauthorized, and was a trespass, and that the defendants are liable for all the damage that resulted therefrom. The testimony shows that the road ran its last car at 11.30 at night; that the first car started at 5.30 in the morning; that there was a period of time within the 24 hours within which the wire might have been raised, even if it required cutting to raise it, that the defendant might have used in removing it from its track, when the business of the general public would not be interrupted. Further in this line, in the view of the court, the passage of these street cars over the street is subject to all the other uses of the street. When the street-car track is not in use, people have a right

to drive over it, walk over it, and use it. The stoppage of these cars at that time of day created an obstruction in every street where the car stopped. It was there an obstruction to the general public travel. We cannot hold that any one has a right to take the law into his own hands under such circumstances as it appears existed at four o'clock on the day of the 16th of May."

Fault is found with the language of this instruction that the defendant was required to choose such a time and under such circumstances as would do no damage to the property of the plaintiff, nor damage to the general traffic of what is really a public institution; that all that could be required of the defendant was that it should do no unnecessary damage, as the cutting of the wires alone would be some damage. Included in plaintiff's bill was \$41.20 for material and labor "in splicing wire," which was allowed by the jury. All the other items were for losses incurred by the unnecessary damage. We are satisfied that the evidence shows that there was ample time, while the motive power of the plaintiff was at rest, and when its cars were not running, to have removed these wires. The removal of them was done at a time when it involved great loss to plaintiff and great danger to human life. Under the circumstances, the defendant company was a trespasser *ab initio*, and liable for all damages. It was shown that no bridge on the defendant company's line was higher than 22 feet, and that the railroad commissioner had sanctioned and consented to the wires of other street-railroad companies, at West Bay City and Lansing, being maintained at a height of 22 feet 6 inches. The defendant company refused to permit the plaintiff to string its wires at this height. The commissioner of railroads had no arbitrary power to fix 24 feet as the height at which such wires must be maintained, in the absence of any showing that a less height was insufficient to prevent any danger to the employes of the railroads. The refusal of the defendant company to permit plaintiff's wires to be raised to 22 feet 6 inches—and the testimony shows they could have been so raised without cutting the wires or destroying property—and its choosing of the time to cut such wires when the plaintiff company was in full operation of its 16 miles of road in the city of Saginaw, was such a violation of the plaintiff's rights as cannot be excused, and justifies the recovery of all damages suffered by the plaintiff on account thereof.

It is also claimed that the public, or the rights of the public, are of no concern in this suit. This may be true, but what the court said as to the rights of the public has also no concern here, as it could have had no possible effect upon the

Measure of
damages for
cutting wires.

jury. The court, in substance, correctly told them that, under the admitted facts in the case, the defendant was liable for all the damages to the plaintiff caused by the cutting of these wires; and what he said about the public and the rights of travellers was but surplusage, which could have done no harm to defendant. The jury gave no damages on account of the public, but simply allowed to plaintiff its items of damages as claimed.

Interest of public as factor in damages.

The claim is made that the court was in error in his instructions to the jury as to the recovery of damages for the cost of a new armature to use in dynamo No. 2. The testimony tended to show that this armature was injured by the cutting of the wires, and that it was attempted to cure such injury by repairs, which amounted to \$78.80, but that it did not work well after such repairs, and finally a new armature was purchased, at a cost of \$375. The defendant upon the trial objected to any recovery on account of damages to this armature, claiming that there was no testimony tending to show that it was injured by its acts of cutting the wires. The circuit judge charged that if the evidence showed that the repairs did not place No. 2 dynamo in as good condition as it was at the time of the cutting, and it became necessary to supply it with an altogether new armature, plaintiff would be entitled to damage for the cost of such armature, but would not be entitled to charge for the repairs; and that if the armature by the repairs was made as good as it was before the injury, then plaintiff could only recover for such repairs. It is now contended that there was evidence tending to show that this new armature was more expensive than the old one, and of more value, and that plaintiff was only entitled as damages to the value of the old armature as it was before injury, less what it is now worth. The jury did not allow the repairs, but gave the plaintiff damages for the full cost of the new armature. The evidence shows that an armature lasts 10 or 15 years, if not injured by some accident. There was no testimony tending to show that this armature taken out of dynamo No. 2 was worth anything for other purposes or for any use connected with the dynamo; nor any attempt on the part of the defendant on the trial to show that it had any value outside of its use in the dynamos; and there was testimony tending to show it could not be used there. One witness testified that the new armature was a little more expensive than the old one, but the president of plaintiff company testified that it was not. The defendant upon the trial was content with the denial that armature No. 2 was injured at all by the cutting of the wires, and made no attempt to as-

Recovery for damage to machinery.

certain the value of the old armature, or how much more costly, if any, the new armature was than the old one. Under these circumstances, we do not think a new trial should be granted because of this claimed excess in damages. The record fails to show that the plaintiff recovered any greater sum than it was entitled to on account of this injury to armature in dynamo No. 2.

The judgment will be affirmed with costs.

The other justices concurred.

PATERSON R. Co.

v.

GRUNDY *et al.*

(*New Jersey Chancery Court, April 28, 1898.*)

Street Railways—Grant of "Railroad" Privileges Does not Preclude Street Railway Privileges.—The mere fact that a charter granted to railway company contains some provisions usually included in special charters granted to railroad companies, such as condemnation of lands and the taking of the railroad by the state, does not require the charter to be construed so as to prevent the construction and operation of a street railway within a city, where the charter expressly confers upon the company the right to construct its railroad from some point within the city to a point without, as well as along any street of the said city.

Term "Horse Railroad Tracks" not Limiting Choice of Motive Power.—In an ordinance of a city consenting to the construction and operation of a railroad within the city, the words "horse-railroad track or tracks" must be taken as descriptive of the railroad to be constructed, and not of the motive power to be used, where the terms "horse railroads," and "street surface railroad" have come to be convertible.

Supplementary Statute—Sufficiency of Title.—A supplementary act whose object is to confer additional privileges upon a corporation under the name mentioned in the title to the supplement is constitutional, as there is no necessity of referring in the title to all the powers given by the supplement.

Right of Abutting Owner to Prevent Obstruction of Street.—If the contemplated use of a street by a street-railway company is authorized by statute, an abutting owner's rights therein are subservient, unless such use imposes an additional servitude upon the land taken by the street or on the abutting land; but when a public use authorized by law takes no property of the individual, merely affecting him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages.

Same—Stringing Wires—Quasi-Easements.—The stringing of a single wire across and in front of the lots of an abutting owner, at a height of 22 feet, if authorized by statute, is not such an invasion of such owner's rights of adjacency as to entitle him to compensation, or justify him in removing the wire, by reason of the fact that he was such abutting owner.

Same—Duty of Corporation to Minimize Damages.—A privilege granted to a corporation of a partial use of a street, which threatens if it does not encroach upon the property rights of an adjacent owner, should be so exercised by the company as to minimize the inconvenience and danger to the enjoyment of such rights.

Choice of Motive Power—Discretion of Company.—A grant to a street railway company of power to place and use on its road cars or vehicles, "to be operated by such motive power as they may deem expedient and proper," gives authority to use the trolley system, although the grant was made to a "street and steam-railroad company," since it will not be presumed that the legislature intended to limit the companies to systems in use at the time the act was passed, it being for the public advantage to allow a street railway company to perfect its systems in accordance with advances in scientific discovery.

Subway Commissioners—Authority to Regulate Trolley System.—An act entitled "an act providing for the placing of electrical conductors underground in cities of this state, and for the creation of a board of commissioners of electrical subways," provides that no electrical wire or cable shall be construed along, across, or above the surface of any street or avenue in any city without authority from the board created by the act. *Held*, that, while the general object of the law is to require electric wires occupying the streets of a city to be placed underground, the commission is authorized to permit wires to be strung in cities until such time as the overhead stringing of wires can be terminated without hardship.

Doubtful Authority to String Trolley-wires—Right of Abutting Owner.—Where the authority of a street railway company to string its trolley wires without the consent of the said commissioners is doubtful, the company is not entitled to an injunction restraining an abutting owner from cutting down the wires which it has placed above the walk in front of such owner's lots.

John W. Griggs, for complainant.

David J. Berry and *George S. Hilton*, for defendants.

GREEN, V.C.—The complainant, the Paterson Railway Company, was formed by the consolidation, under the act of 1888 (P. L. 1888, p. 74), of the Paterson City Case stated. Railway Company, the Paterson & Passaic Railroad Company, and the Haledon Horse Railway Company, three corporations operating street railways in the city of Paterson and its vicinity at the time of such consolidation, on April 28, 1888. The Paterson City Railway Company was organized under the provisions of the statute (Revision, p. 922, § 76) by the grantees in the deed of the master, under proceedings of foreclosure and sale of the property and franchises of the Paterson & Little Falls Horse & Steam Railroad Company, which was included in a mortgage executed by the said company to secure the payment of bonds issued by it. This last-named company was incorporated by act of the legislature approved April 9, 1866 (P. L. 1866, p. 1068). A supplement to the said charter was passed by the legislature, and approved March 14, 1870 (P. L. 1870, p. 529). The original charter gave the company au-

thority to operate its cars by such motive power as it might deem expedient and proper. Prior to the foreclosure and sale of its property and franchises, it had built and was operating a surface railroad on various streets in the city of Paterson, including a portion of River street.

The bill alleges that the complainant corporation, being of opinion and having determined that it was expedient and proper to operate its railway system by the application of electricity to electric motors for the propulsion of its cars, instead of horse power, as formerly, adapted two of its routes to that method, and was engaged in preparing to put it in operation on their railway on River street, embracing the section of that street on which defendant Joseph C. Grundy owns several lots. The allegations of the bill with reference to the adoption of the plan and the method of its practical application are substantially as follows: The company, in the exercise of the discretion confided to it, and in discharge of its duties to use its public franchise for the transportation of passengers in the most commodious and advantageous manner, has decided and does deem that it is necessary for the securing of more rapid transit to substitute electricity for horses as the propelling power of its cars, and that, as a matter of fact, there is now but one safe and practical system known and in operation for supplying the electrical current to the cars, and that is what is known as the "trolley" or "overhead" system. That the system of electrical motors used by the company is that known as the "trolley" or "overhead" system, which consists of iron posts set near the curb-line in the sidewalk of the street, upon which insulated wires, called "feed-wires," are stretched at a height of about 22 feet above the street. Two other wires, called the "trolley wires," are stretched above the tracks, and are connected at intervals by cross-wires with the feed-wire. A rod or arm extends from the car and connects with the overhead trolley-wire. Through said rod the electrical current is transmitted from the overhead wire to the running gear of the cars. The bill further alleges that the company, at the time of filing the bill, had nearly completed the erection of the poles and stringing the wires along its line, from its terminus in River street, through River street, a distance of about three quarters of a mile, in which work it had expended a large sum of money, and that the line was nearly completed and ready for use, to be operated under the trolley system. In these preparations the employes of the company had strung a feed-wire along and over the sidewalk, near the curb-line, in front of lots Nos. 557, 559, 561, and 563 River street, owned by the defendant Joseph C. Grundy; the wire being, as alleged, one of the wires neces-

sary for the operation of the trolley system by electricity, adopted by the said company, and intended to be used in propelling cars upon its tracks on River street. This wire was 22 feet above the surface of the sidewalk, and was attached at both ends to poles set in the ground at the edge of the curb on the sidewalk—one upon lands southwest of defendant's lands, and the other upon lands northeast of defendant's lands. On the 7th day of June, James Grundy and John Grundy, brothers of the said Joseph C. Grundy, and by his direction, cut the wire stretched in front of the lands mentioned. To do this they put a ladder up against the limb of a tree, and James held a sledge-hammer against the wire, while John cut it with a chisel or some sharp instrument. The defendants threatening to cut the wire as often as it should be strung across that space, the complainant, the railway company, filed the bill in this cause for an injunction to prevent their so doing.

On the presentation of the bill, an order to show cause why an injunction should not issue, in pursuance of the prayer, restraining the defendants from interfering with the said wire, was issued, with a restraining order forbidding the defendants from so doing until the further order of the court. A copy of this order was served upon the defendants by the deputy sheriff of the county of Passaic; but one of the defendants, notwithstanding the mandate of the court, again cut the wire, which had been replaced. On the hearing of the order to show cause, the violation of the previous order of the court was brought to the attention of the court, by motion to punish the party, of which notice had been given, with copies of affidavits to be presented. This act was committed by one of the defendants, who was not the owner of the property, and the hearing of the order to show cause proceeded against the owner. No answer was filed by the defendant, but affidavits of Joseph C. Grundy and John Grundy were presented, and the injunction was resisted, on the ground that the complainant had no legal authority in the premises.

The affidavits show that the defendant Joseph C. Grundy objected to the company laying two tracks in River street, and refused his consent to their putting up poles upon, or stringing wires across, his sidewalk, unless compensation was made to him for the damages which would result from such use; that he notified the company to remove the wires after they had been strung, and that he would cut them if not so removed; and that John and James C. Grundy did cut the wire, after waiting for the company to take it down. The claim is made by the affidavits that it would be impossible to raise a ladder up to the buildings in case of fire, or if the owner wished to paint or repair; that the tracks do not leave

sufficient room between the rail and sidewalk for horses and wagons to safely pass while the electric railway may be in operation; that the tenants are incommoded, and that two of them have moved on account of alleged danger to the lives of their children; that the route of the original Paterson & Little Falls Horse & Steam Railroad Company did not go on River street; and that the only motive power used was by horses hitched to the cars, until the last two or three months, when the electric-trolley system was first used. The affidavits present no justification of the acts of the defendants, unless it is true that the complainant company has, without lawful authority, placed an obstruction on the highway, which any one may remove, or without such authority has invaded some right of the owner of the premises in a way to justify him in forcibly removing the obstruction so placed upon the use of his property. The objection urged by the defendants' counsel was a want of legal authority in the complainant—First, to maintain a two-track or any railway on River street; and second, to use electric motors, or erect and maintain on the streets the necessary appliances for the transmission of electricity to the cars.

Has the complainant lawful authority to maintain a street railway on River street? Whether such right is for two

tracks or only one cannot affect this controversy.

Consolidated
company—
Powers.

The complainant insists that, by virtue of the proceedings taken in pursuance of the act of 1888, it is vested with the rights, privileges, and franchises of each of the three corporations which were consolidated into the complainant corporation. The second section of that act provides that, on making the agreement of consolidation, and filing the same or a copy with the secretary of state, "the several corporations, parties thereto, shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing all rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of each of such corporations so consolidated;" and by section 3, "that, upon the consummation of said act of consolidation, all and singular the rights, privileges, and franchises of each of said corporations, parties to the same, and all property, real, personal, and mixed, * * * shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed." By the act of consolidation, therefore, the complainant was vested with all the rights, privileges, franchises, and property at that time enjoyed, owned, or possessed by the Paterson City Railway Company.

This latter company existed by virtue of the provisions of

the statute providing for the incorporation of a new company by the purchasers of the franchises and property of a railroad under foreclosure proceedings. Revision, p. 921. Section 76, p. 922, provides that a new corporation formed under that act, on complying with the provisions of the act, shall have and possesses all powers belonging to corporations organized under the laws of this state, and all powers conferred by said laws upon the corporations whose franchises and property were sold and bought as aforesaid. It shall receive, have, and hold the railroad property and franchises within this state included within and bound by said mortgage, or sold and purchased at said sale, subject only to all liens, contracts, etc., prior to the making of the mortgage; with a proviso that in no event shall such new corporation be deemed or construed to have acquired by virtue of any such sale or purchase any different rights, franchises, or privileges from those possessed by said original corporation, and conveyed or intended to be conveyed by such mortgage as aforesaid. By virtue of the proceedings of foreclosure sale and reorganization and the provisions of law, the Paterson City Railway Company became vested with the rights, privileges, franchises, and property granted to the Paterson & Little Falls Horse & Steam Railroad Company under the original act of April 9, 1866, and the supplement thereto, approved March 14, 1870. By the original act (section 7) the last-named company was authorized to construct and operate a railway to commence at some point in or near the city of Paterson, in the county of Passaic, to Little Falls, in the county of Passaic; by section 14, that the said railway may be constructed along the public road or highway within its route upon obtaining the consent, in writing, of the township committee in which said route may extend, or a majority of them, and along any street in the city of Paterson on obtaining the consent of the mayor and aldermen of said city, or a majority of them; and, whenever said railway is located on or across any street or highway, the said company shall, as soon as may be, restore such street or highway to such state or condition as not to impair its usefulness; and such railway and the rails thereof shall be constructed and maintained in such manner, and the rails thereof of such size and pattern, as to impair as little as practicable ordinary travel on such streets or highway. By the supplement of 1870 the company were empowered to lay out and construct a single-track railway, with the necessary turnouts, through and along any streets and avenues in the city of Paterson, north of Market and Congress streets, and northwest of the Passaic River, in said city of Paterson: provided, that the consent, in writing, of a

majority of the owners of the land (reckoning by the number of lineal feet) fronting on both sides of said streets or avenues, being first had and obtained, and filed in the office of the clerk of the county of Passaic; and, further, that the said railway shall not be constructed in any parts of said streets or avenues without the consent of the mayor and board of aldermen of said city for that purpose being first duly granted at a meeting of the board.

There is no dispute that River street, at the point in controversy in this suit, is within the district named in the supplement. The bill avers that, prior to the construction of the road in River street, the company did obtain the consent, in writing, of the majority of the owners of the land (reckoning by the number of lineal feet) fronting on both sides of said streets and avenues, and did also obtain the consent of the mayor and aldermen of the city of Paterson, which was duly granted at a meeting of the board of aldermen held July 27, 1868, and these averments are verified by the affidavit annexed, and are not questioned or denied by the affidavits presented by the defendants. Counsel for the defendants, on the argument, presented a certified copy of the ordinance of the mayor and aldermen of the city of Paterson passed July 27, 1868, certified under the seal of the city clerk to be a true copy, as made from the ordinance book. By this ordinance it is provided "that it shall be lawful for the Paterson Falls Horse Railroad Company to construct and lay in said city, from the Van Winkle Street Bridge, in Van Winkle street (now River street), through Van Winkle street to Bridge street, and through Bridge street to Broadway, and through Broadway to West street, through West street to Hamburgh avenue, to Union avenue, and through Union avenue, to the line dividing the city of Paterson from the township of Manchester, such rail or rails for a horse-railroad track or tracks, and of such style and width, as are constructed, laid, and used for horse railroad between the Pavonia avenue and Cortlandt street ferries, in the city of Jersey City, in the state of New Jersey."

Counsel for defendants claim that the original charter of 1866 did not authorize the construction of a railroad through River street; that by that charter a railroad was authorized to be constructed from Paterson to Little Falls; and that, by the terms and provisions of that charter, it is evident that the legislature did not intend to incorporate a railroad in a municipality, as it contains provisions for the condemnation of lands and for the state taking the railroad, on making compensation therefor; that Little Falls was a village lying out-

Grant of
"railroad"
privileges does
not preclude
street-railway
privileges.

side of the city of Paterson; and that the whole legislative intent was to authorize a road to connect the two places. While the act does contain some provisions which were usually inserted in special charters granted to railroad companies prior to the amendments to the constitution, it also expressly confers upon the company the right to construct its railroad from some point in, as well as near, the city of Paterson, and also along any street in said city, on obtaining the consent of the municipal authorities.

It is next urged that the consent given by the ordinance is only to construct and lay rails for a railroad to be operated in the city by horses. These words "horse-railroad track or tracks," used in the ordinance, must be taken as descriptive of the railroad to be constructed, and not of the motive power to be used. Railways in the streets of cities, laid to conform with the grade of the streets, and properly known as "street-surface railroads," had by common usage been designated as "horse railroads" from the fact that they were for a long time operated exclusively by horses being attached thereto, and "horse railroads" and "street-surface railroads" have come to be convertible terms. The ordinance granting the consent of the city, in using these words, used them as descriptive of the track which was commonly used in the construction of that kind of railroad, indicating the character of rail which would interfere as little as possible with the usual and ordinary use of the street by ordinary vehicles.

Choice of
motive power
—Discretion
of company.

It is next claimed that the act of 1870 is void, because the object of the act is not expressed in the title. It was argued that the object of the act is to confer upon the company named in the title authority to construct and operate a railroad in certain streets in the city of Paterson solely, whereas the title of the act refers to a horse and steam-railroad company between Paterson and Little Falls. This idea is the result of construing the designation of the company by its name as the statement of the object of the act in its title. The object of the act was to confer additional privileges upon the company, which was originally incorporated by the act of 1866, under the name mentioned in the title to the supplement. It was no more necessary to refer in the title to all the powers to be given by the supplement than it was to set out in detail every franchise granted to the corporation by its charter. The titles of such acts were generally nothing more than to incorporate a company, designating its corporate name. While it is true that no power could be granted by the supplement

Sufficiency of
title to act.

which would have been unconstitutional if incorporated in the original act, that argument does not invalidate the supplement, because it would have been entirely competent for the legislature in 1866 to have granted, under the original act, the powers which are given by the supplement of 1870.

It is next claimed that this company has only the right to place a single track in any of the streets in the city of Paterson, but it is difficult to perceive how this could give the defendant the right to cut a wire which the company may have strung across the sidewalk in front of his property. In my opinion, the right of the complainant to operate a street-surface railway in River street, in front of Joseph C. Grundy's property, is clear.

Has the complainant corporation the right to apply electricity by what is known as the "overhead trolley system," to the propulsion of its cars, and to erect and maintain the appliances necessary for the application of such power." The question as to the absolute right of Joseph C. Grundy to cut the wires strung over his sidewalk by the complainant presents itself in a

Right of abut-
ter to remove
trolley-wires.

twofold aspect, viz. his right as the owner of abutting property, and his right as a citizen. The complainant in this case has not placed upon the land in front of defendant's property any obstruction at all. His sidewalk is unencumbered. The posts are erected upon the lands of the owners of property on either side of his lot, and the only obstruction is the stringing of a wire 20 odd feet above the curb-line, in front of his lands between these poles. In considering the right of the defendant as an abutting owner to remove the wire, we assume for the present that the complainant has legislative sanction for the operation of its railway by the use of electrical force and its appliances; for, if it has not, the defendant's right to clear the air of obstructions is as unquestionable as his right to clear the surface of the street in front of his property. If the contemplated use of the street by the complainant is authorized by statute, the defendant's rights therein are subservient thereto, unless such use imposes an additional servitude upon the land taken by the street fronting defendant's property, or on his land abutting thereon. The special rights of the abutting owner in the streets are *quasi*-easements of access and light and air over the land of the street fronting his property. *Barnett v. Johnson*, 15 N. J. Eq. 481; *Dill v. Board*, 47 N. J. Eq. 441, 32 Am. & Eng. Corp. Cas. 80. These he cannot be deprived of without compensation being made to him. *In re New York El. R. Co.*, 70 N. Y. 327; *In re Gilbert El. R. Co.*, *Id.* 361; *Story v.*

Railroad Co., 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596; *Lahr v. Railroad Co.*, 104 N. Y. 268; *Drucker v. Railroad Co.*, 106 N. Y. 157, 30 Am. & Eng. R. Cas. 418; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252. These are interests distinct from those possessed by the general public, and are rights appurtenant to the lot and the improvements thereon. *Decker v. Railway Co.* (Ind. Sup.), 33 N. E. Rep. 349. It is equally well settled that when a public use, authorized by law, takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property, occasioned by such use, furnishes no basis for damages. *Radcliff v. Mayor*, 4 N. Y. 195; *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Moyer v. Railroad Co.*, 88 N. Y. 351; *Uline v. Railroad Co.*, 101 N. Y. 198, 23 Am. & Eng. R. Cas. 3; *American Bank Note Co. v. New York El. R. Co.*, *supra*. The defendant's right to compensation, if any, springs, therefore, from his rights of adjacency, not from the fact of proximity. It must be an interference with some one of the rights of access or of light or air, which, so far as the adjacent owner is concerned, hampers complete legislative control of the street for public use as a highway. The stringing of a single wire across and in front of the defendant's lots, 22 feet above the curb-line, cannot seriously be said to be any substantial interference with his *quasi*-easement of light and air. Of course defendant's rights of adjacency over the surface of the street are not impaired by the acts of the complainant; but the abutting owner has not only the right of ingress and egress in the accustomed manner, but also to have the way of access to the upper stories of his house kept free from obstructions which will prevent its use in emergent cases, such as fire, or which cannot be quickly displaced in such an emergency without serious danger to the person attempting their removal. The pleadings and affidavits before me on this order to show cause do not fairly present the question of fact whether the "feed-wire" strung over defendant's curb-line might not have been placed over the middle of the street without impairing its efficiency, nor what is the real danger, if any, in having it where it is now suspended. There can be no question that a privilege granted to a corporation of a partial use of the public highway, which threatens, if it does not encroach on, the property rights of the adjacent owner, should be so exercised by the company as to minimize the inconvenience and danger to the enjoyment of such rights. If it is not simply a question of expense, and the stringing of such are accessory to the electric railway, as a feed-wire over the middle of the street, instead of over the sidewalk, does not

destroy or seriously impair its usefulness, and if the strength of the electrical current through it is so great that there is danger in handling such a wire in case it is necessary to quickly remove it, the company should be required to string it in the way attended with the least interference and danger to adjacent property ; or, and if that is impracticable, then to adopt mechanical appliances of safety as "cut outs," as were required by the chancellor in the case of *Jersey City & B. Ry. Co. v. Jersey City*, 1891.

The bill in this case practically alleges that the appliances used by the company are those which are best adapted to the purpose, and the affidavits of the defendant only set up that the wire in question will interfere with the putting up of ladders in case of fire, or his desire to paint his house. There is also an apprehension of danger expressed. But it is only the opinion of the defendant. Whether he is qualified to pronounce a reliable opinion on the question or not does not appear, and the facts in this case do demonstrate that this wire can be expeditiously and safely removed. We must therefore deal with the question of this wire without regard to the element of danger, and consider it simply as a wire strung over defendant's sidewalk. In *Lockhart v. Railway Co.*, 139 Pa. St. 419, the judge says : "The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and he has certain special rights as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or a destroying of his property." The distinction between the use of a street by telephone and telegraph companies and street railways, in this, that the latter is, and the former is not, consistent with the character of a highway, is clear, and is recognized in *Halsey v. Railway Co.*, 47 N. J. Eq. 380 ; yet Chancellor Runyon, in *Roake v. Telegraph Co.*, 41 N. J. Eq. 35, 12 Am. & Eng. Corp. Cas. 340, denied complainant a preliminary injunction to restrain the telegraph company from stringing wires over the street in front of his lands, on the ground that his right was not clear, as well as that the injury, if any, was not irreparable, but expressly disclaimed any intention to pass on the main question. He, however, does say : "The legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the streets ; for while it recognizes such rights as to the erection of poles, it does not do so as to the wires." *Hewett v. Telegraph Co.*, 4 Mackey, 424, and *McCormick v. District of Columbia*, *Id.* 396, were both applications for injunctions to restrain the putting up of a telegraph-line

along a street in Washington. These were refused, because no irreparable injury was threatened, and that it could not be seriously contended that access or light or air was interfered with, and the danger and nuisance from the wires were very slight. Of course, neither of these cases is exactly in point, but they are sufficient to show how shadowy is the right on which the defendant relies. In my opinion, the act of the complainant in stringing its wires in front of the defendant's lots, if authorized by statute, was not such an invasion of defendant's rights of adjacency as to entitle him to compensation, and consequently he was not justified in removing it by reason of the fact that he was such abutting owner.

His right as a citizen, in common with all others, depends on the question whether the occupation of part of the street by the complainant was without lawful authority, and, as such, a nuisance which any one could abate. Complainant claims the right to use the overhead-trolley system in the application of electricity to its cars as a motive power from the original charter of 1866 and the supplement of 1870, as well as by the act of 1886 and the consent of the city authorities of Paterson. By section 16 of the original charter of 1866 it is provided "that the said company shall have power to construct or have constructed, or to purchase with the funds of said company, and place and use on said railway, or any part thereof, cars, engines, wagons, carriages, or vehicles for their own use, or for the transportation of passengers or any species of property, for hire, to be operated by such motive power as they may deem expedient and proper." And by section 2 of the supplement of 1870, it is provided "that, in the construction, equipment, management, running, and operation of said railroad, the said company shall have and possess all the powers, authority, and privileges granted to and conferred upon them by the act to which this is a supplement."

Right to use
trolley system.

The right of the legislature over the public highways, and to grant the use thereof for the public convenience and travel, so long as it does not impose additional servitudes upon the property, and does not materially obstruct the public use by ordinary and accustomed methods, is undoubted. *State v. Mayor, etc., of Newark*, 49 N. J. Law, 344-346. Its power to authorize the erection of lamp-posts, water-plugs, and fire telegraph poles on the public highways has never been questioned. They are for the public advantage, and their occupation of the surface of the ground, and consequent inconvenience, is infinitesimal. In this case the grant is not the right to use steam or horses in the operation of their cars, but any motive

power they may deem expedient and proper. It has but one limit, and that is the discretion and judgment of the company, to be regulated, of course, by the controlling rule that the means adopted shall not obstruct the public use in its accustomed way. Nor do I think this power is limited to the methods known or in practical use at the time of the grant. Practically, these were confined to animal and steam power. If the grant had been to use a specific power, in known use, in a particular way, if they deemed it expedient and proper, there might be strength in the argument that it did not authorize such method in another way, which required other and additional use of property; but here the grant of authority is as ample as words can make it, and would seem to embrace, not only known systems of ways of propulsion, but all improvements which science and ingenuity might devise, subject to the conditions before specified. In *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 393, 56 Am. & Eng. R. Cas. 469, in the New York Court of Appeals, a similar question arose. The defendant company, by act of 1862, were authorized to use "the power of horses, animals, or any mechanical or other power, or the combination of them, which the said company may choose to employ, except the force of steam." On its right to use the trolley system in the application of electricity for the traction of its cars the court says: "The act of 1862 cannot properly be limited to such methods of operating street-surface railways in cities as had then been invented and were then in actual use. The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available, to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. Electricity, as a natural and applied force, was then well known, and it is reasonable to infer that its adoption as a propelling was even then anticipated. It would be an unjust reflection upon the wisdom and intelligence of the lawmaking body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass, the inventive and progressive tendency of the people." See also *Taggart v. Railway Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208; *Williams v. Railway Co.*, 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 215; *Macomber v. Nichols*, 34 Mich. 212; *Railway Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608.

The bill also avers that by an ordinance passed by the board of aldermen of the city of Paterson on the 6th day of October, 1890, approved by the mayor on the 10th of October, 1890, the complainant was authorized to use electric motors as the propelling power of their cars—an averment which is verified by the affidavits annexed to the bill, and is neither controverted nor denied by the papers presented by the defendant. The authority to pass this ordinance is claimed to be derived from the act of March 6, 1886, entitled "Concerning street-railroad corporations" (Supp. Revision, p. 369). The right of a street-surface railroad company under this act, and such consent, to use electric power, and maintain the proper accessories thereto, for the propulsion of its cars, is, so far as this court is concerned, settled by the case of *Halsey v. Railway Co.*, 47 N. J. Eq. 380, and by that decision the right of the complainant to erect its appliances for the application of this power for the movement of its cars would seem to be clear under the rights which have been granted to it by the legislature and the authority of the city of Paterson. The views of the vice-chancellor in that case are sustained by the decision in Rhode Island of *Taggart v. Railway Co.*, *supra*; in Ohio, in *Railway Co. v. Winslow*, 3 Ohio Cir. Ct. R. 428, and in *Pelton v. Railroad Co.*, 22 Wkly. Law Bul. 67; in Kentucky, in *Louisville Bag Manuf'g Co. v. Central Pass. Ry. Co.* (Louisville Law & Eq. Ct.), decided June 30, 1890; in Michigan, in *Railway Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608; in Pennsylvania, in *Lockhart v. Railway Co.*, 139 Pa. St. 419; in Maryland, in *Koch v. Railway Co.* (Md.), 50 Am. & Eng. R. Cas. 401; and in United States Circuit Court, in *Williams v. Railway Co.*, 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 415. See also consideration of the question and cases in *Keasbey on Electric Wires in Streets and Highways* (chapter 10).

The legislature, by the fifth section of an act creating a state board of commissioners of electrical subways, approved March 10, 1892, enacted "that no telegraph, telephone, electric light, or other electric wire or cable shall hereafter be constructed along, across, or above the surface of any street or avenue in any city in this state until the board created by this act shall, by the votes of a majority of its members, authorize such wires to be carried along, across or above the surface of such streets or avenues; provided, that this section shall not be constructed (*sic*) to apply to the repair of wires now in use, or to wires owned by any (*sic*) of this state, or used for fire or police purposes therein." This statute was approved prior to the attempt on the part of the complainant to string its wires above the street in front of the defendant's property. There

Duties of subway commissioners.

is no averment in the bill that the consent of the subway commission had been obtained by the complainant, nor is want of such authority set up in the answer. The statute, however, is a public statute operating over the whole state, and affecting every city therein. No private corporation can possibly enjoy the right to use the public highways except by legislative sanction; and, if the legislature has imposed conditions on all claiming such legislative authority, as it affects the interests of the public, it would be the duty of the court to apply the test imposed by the latest legislation, whether the parties pleaded it or not. The point that the question is not raised by the pleadings was, however, not strenuously urged, as counsel frankly stated it was a matter easily reached by amendment, if necessary. This section, unaffected by the proviso, unquestionably imposed a new condition on all parties intending to string electric wires above the surface of any street or avenue in any city in the state. No question was, or can be, made as to the power of the legislature to impose new limitations, on any previous concession of authority to the complainant, to partially use the highways of the state.

It is claimed, however, that the rights of the complainant are not affected by the section in question, because it is unconstitutional, as not being within the scope and provision of the title of the act. The title is, "An act providing for the placing of electrical conductors underground in cities of this state, and for the creation of a board of commissioners of electrical subways." It is urged that the object of the law, as gathered from the title, is to provide for the placing of wires underground, and for the creation of a board to do that specified thing; that it might have been competent to have enlarged the scope of the title to regulate the placing of wires generally, but that it had not done so, and limited it to subway wires and a subway commission. But the single general object of the law, as gathered from its title and provisions, undoubtedly is to require electric wires occupying the streets or avenues of a city, sooner or later, to be placed underground. The commission is the means by or through which this object is to be accomplished, and, that no hardship be occasioned by an abrupt termination of all right or license to string wires in cities, the commission is authorized to permit it being done. While not clearly so, this seems to me to be *germane* to the object of the law as stated in the title, and fairly within the rule laid down in the authorities which are cited by the chancellor in *Attorney-General v. Central R. Co.*, 24 Atl. Rep. 964, at page 971.

It is also claimed that the section itself does not by its

terms render it necessary for the complainants to obtain the consent of the commissioners. There are two obvious errors in the proviso of section 5, as it appears in the Pamphlet Laws, which, it is said, also exist in the original on file in the secretary of state's office. The word "constructed" has evidently been substituted or used for the word "construed," and there is a palpable omission after the word "any." No great difficulty arises from the first, but the other undoubtedly raises some very plausible suggestions. It is first argued that in construing this section it is not allowable to inquire whether the legislature intended to put some word after the word "any," nor to interpolate such word, even if it is evident what it should be. To the latter proposition I yield an unhesitating assent. You cannot go outside the law to ascertain the intent of the legislature, nor can you supply words to make it conform to what you understand the meaning of the legislature to be. But I think it is competent, when a construction is sought to be placed upon the words of the act, to ascertain whether it is not apparent from the context that there has been some word omitted, which fact itself will negative the construction sought to be given; not by supplying a word to give some other construction, but deducing from the fact of omission that the proposed construction is not correct. This does no violence to the rule that the legislative intent must be gathered from the act itself. Counsel argues that "any" is here used as a pronoun, and, when used in this sense, has a most comprehensive signification; that, construed with that to which it applies, which, it is argued, is to that which immediately precedes, namely, "wires owned," it must be held to mean any one capable of ownership, individual or corporate; and numerous examples of such comprehensive use of the word by itself are cited. It is, however, to be noted, that such extended sense of the word is in such cases derived from the context, and that the sentence or paragraph is complete as it stands. On reading this proviso, however, the first impression is that some word has been omitted—its incompleteness is at once manifest; but, if the construction contended for is correct, the only word which would comprehend it would be "one," making it read "any one." Such construction, however, would render nugatory the whole section, and cannot be adopted. It is apparent, I think, that the omitted word is "city," but I agree with counsel that we cannot by judicial construction interpolate it. The difficulty, however, arises with only one division of the proviso; two others are complete and operative. The proviso enacts that the section shall not apply to the repair of

Consent of
commissioners
required by
statute.

wires now in use. There is no obscurity so far. It is not necessary to obtain the consent of the subway commission to string wires in a city, if it is done in repairing wires now in use; nor is it for wires used for fire or police purposes therein. "Therein," from the context, must relate to "state." There is also the sentence under consideration, "or to wires owned by any of this state." It seems to me impossible to give any satisfactory meaning to these words taken in connection with the context. But is the whole section on that account to be disregarded? I think not. The provision of the section requiring the consent of the commission is perfectly clear. There is no doubt from the proviso that it is not to apply to the repair of wires now in use, or to wires used for fire or police purposes. Thus far the meaning of the legislature is distinct. It appears they meant to except some other wires, but, for want of apt words, they have failed to indicate what. It cannot be presumed that it was a class which would embrace the complainant; but, as we cannot from the words give it a satisfactory application, it is to be disregarded. The rest of the section is not affected by such course.

But, whether these views are correct or not, that there is doubt is doubt is sufficient to defeat the complainant's application for a preliminary injunction. Its right thereto must be clear and undoubted. Its right, in my opinion, would be complete but for the act of 1892. Whether it is constitutional, or whether it applies to the complainant, is at least open to dispute. If so, it is fatal to this application, for the court does not grant a preliminary injunction when the complainant's rights rest on doubtful points of constitutional law, or the questionable construction of a statute. *Inhabitants of Greenville v. Seymour*, 22 N. J. Eq. 458; *Bonaparte v. Railroad Co.*, *Baldw.* 205; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Railroad Co. v. Prudden*, 20 N. J. Eq. 530; *Black v. Canal Co.*, 22 N. J. 130, 131.

The rule to show cause must be discharged.

Street Railways—Right to Use Electricity as a Motive Power.—See note, 50 Am. & Eng. R. Cas. 416; *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, *ante*, p. 469.

Subway Commission—Powers as to Granting Franchise for Overhead Wires.—In *Church Trustees v. State Board of Com'rs of Electrical Subways* (N. J., July 17, 1893.), 27 Atl. Rep. 809, it was held that the act of March 10, 1892 (P. L. 1892, p. 78), creating the board of commissioners of electrical subways, does not empower the board to grant to a street-railway company the franchise of erecting poles and wires in the street to furnish power to propel cars by electricity. The functions of the board are simply supervision over the exercise of franchises derived from other legislative authority. *Held*, also, that a resolution of the board granting a company

permission to construct and maintain electric wires above the surface of the street will operate only to relieve the company from the interdict contained in the fifth section of the act. Whether acts done by the company under color of the resolution are legal will depend upon whether such acts were lawful independent of the resolution.

Speed of Train on Street—Reasonableness of City Ordinance not Question for Jury.—In *Metropolitan St. R. Co. v. Johnson* (Ga., Oct. 24, 1892.), 16 S. E. Rep. 49, it was held that the reasonableness or unreasonableness of a city ordinance regulating the speed of a train upon a street is a question of law for the court to decide, and not for the jury, unless it depends, in the opinion of the court, on the existence of particular facts which are disputed. The court said: "Such an ordinance may be reasonable as applied to one locality, and unreasonable as applied to another. Although it may be reasonable as to populous parts of a city, it may not be so with reference to uninhabited districts near the corporate limits. If the nature of the locality is a matter of dispute, the court should furnish the jury with the test by which the reasonableness of the ordinance, as applied to the particular locality, is to be determined, instructing them as to the conditions under which it would apply and those under which it would not; and it would be for the jury to say whether or not the ordinance was reasonable and applicable, according as they might find these conditions to exist or not. *Central Railroad, etc., Co. v. Brunswick & W. R. Co.*, 87 Ga. 392, 37 Am. & Eng. R. Cas. 282, and cases cited; *Horr & B. Mun. Ord.* §§ 239, 145. The expression in *Railroad Co. v. Young*, 81 Ga. 418, to the effect that the court below ought perhaps to have left it to the jury to say whether the ordinance was reasonable, instead of assuming its legality, and charging them upon that assumption, was merely an incidental suggestion, no direct question having been made which could call for a ruling on this point. In the present case the court charged that it was for the jury to decide upon the validity of the ordinance, yet no issue of fact had arisen which would require the submission to them of the question of its reasonableness or unreasonableness in its application to the locality in which the injury took place. This we hold to be error."

CITY OF PHILADELPHIA

v.

CITIZENS' PASSENGER R. Co.

(151 *Pennsylvania St.* 128.)

Street Railway Extensions—Strict Construction of Charter.—A statute authorizing a street-railway company to extend its lines to portions of certain streets lying "between" Montgomery street and Germantown road, does not allow an extension along the Germantown road, when construed in accordance with the principle that, in construing grants of powers to corporations, whatever is not given in clear and express terms, or by necessary implication, is conclusively considered to have been withheld.

Same—Consent of Municipal Council.—When a charter granted to a street-railway company requires the consent of the city council for any extension of the railway lines, and a supplement authorizes the extension

of the road without consent, a second supplement which is silent as to consent is to be taken subject to the requirement of the charter that consent shall be obtained.

APPEAL from Philadelphia court of common pleas.

Following is the opinion of the court below:

"The Citizens' Passenger Railway Company was incorporated by the act of March 25, 1858 (P. L. 166), with power to construct a railway, for passengers only, on Tenth and Eleventh streets, from Columbia avenue, on the north, to Reed street, on the south. Its charter provided 'that before the company shall use and occupy the said streets the consent of the councils of the city of Philadelphia shall be first obtained; and said consent shall be taken to have been given if said councils shall not, within thirty days after the passage of this act, by ordinances duly passed, signify their disapproval thereof; and said councils may from time to time, by ordinance, establish such regulations in regard to said railway as may be required, for the paving, repaving, grading, culverting, and the laying of gas and water pipes in and along said streets, and to prevent obstructions thereon.' In pursuance of this charter the councils of the city, by an ordinance approved April 16, 1858 (page 145), by the first section thereof, declared its disapproval of the said act, and of the right therein granted to the Citizens' Passenger Railway Company, to use and occupy the streets of the city therein named, but further ordained, by the second section, that if the said company shall, within ninety days from the passage of this ordinance, and before they shall use or occupy any of the said streets, file in the office of the city solicitor a written obligation, sufficient, in his opinion, in law, to bind the said company to observe and be subject to all ordinances of the city of Philadelphia in relation to passenger railways then in force, or at any time thereafter to be passed, then the provisions of the first section of this ordinance shall be of no effect. The company filed such an agreement, and proceeded to construct its railway. By the act of April 11, 1863 (P. L. 319), the said company was authorized to extend its tracks to Montgomery street, which is one square north, and to lay a track on said Montgomery street. By the act of March 22, 1865 (P. L. 568), the company was further 'authorized, whenever and at such times as the public convenience may require, to extend their road northwardly, on Tenth and Eleventh streets, between Montgomery street and German-town road, with the right to continue the same on any street between these two points, subject to all the limitations and restrictions and with all the privileges granted to the said

company under their act of incorporation.' In pursuance of this last act the company has extended its road northwardly on Tenth and Eleventh streets to Cumberland street, which is seven squares north of Montgomery street, and further north on Eleventh street, with a single track and turnouts to Cambria street, which is four squares north of Cumberland street, and has connected its Tenth and Eleventh street tracks by a connecting track laid in Cumberland street. Ordinances of the city adopted prior to and since the charter of this company require passenger railway companies to conform to the street grades as established by law; to submit all plans, courses, and styles of rail to the board of surveyors for approval; to lay flagstones at crossings or intervals of two hundred and fifty feet; to pave, repair, and repave the streets occupied by them; to keep the streets clear of snow; to run their cars at a safe rate of speed; pay licenses for each car run on the road; and generally to comply with all the ordinances of the city. An important ordinance, approved April 1, 1850 (page 138), provides in its first section and fourth paragraph 'that no connection shall be made by one company with the road of any other company without the special authority of city councils, except when otherwise provided for by their charter.' Another ordinance, approved February 28, 1860 (page 96), ordains 'that it shall not be lawful for any person or persons, body corporate or otherwise, to remove any of the cobble pavement of the highways of the city, for any purpose whatever, without first obtaining a permit from the department of highways, under a penalty of \$500, provided that it shall not apply to the repairing of streets by the passenger railway companies, and that it shall not be lawful for the department of highways to grant any permit for the removal of any of the pavements of the city, for the purpose of laying down rails for passenger purposes, until after first procuring the assent of the councils of the city thereto.' Another important ordinance or resolution, approved May 7, 1869 (page 187), instructs the commissioner of highways to prevent the removal of the stones and the obstruction of any of the streets for the purpose of laying a railroad track; and the surveyors of the city are instructed not to lay out or survey any streets for the purpose of laying such track until permission of councils has been obtained, allowing the same to be used therefor.

"It is well to observe here that these ordinances to prevent the removal of cobblestones have no restraining force, and do not apply to the streets in which a railway company is authorized to lay its tracks by its charter (*Philadelphia v. Railway Co.*, 3 Brewst. 547, A.D. 1869), and that while con-

structing a railway in a street is not a nuisance, when the charter authorizes the occupation of the streets (*Faust v. Railway Co.*, 3 Phila. 164, A.D. 1858), it is a nuisance *per se* when it is constructed without authority. (*Attorney-General v. Railway Co.*, 1 Wkly. Notes Cas. 489, A.D. 1875.) The graded and paved streets of the city are artificial roads. The city is the owner of them, and the paving materials in them, so far as they may be said to have an owner, and the consent of the city must be obtained by passenger railway companies when their charters require them to do so (*Com. v. Central Pass. R. Co.*, 52 Pa. St. 506, A.D. 1866); but a street-passenger railway company, incorporated prior to 1874, with nothing in its charter making the consent of the city councils a prerequisite to the exercise of its powers in the extension of its road, may make such extension without the consent of councils, neither the constitutional amendment of 1857, the constitution of 1874, nor the act of May 23, 1878 (P. L. 111), repealing the unrestricted right of the company to lay its tracks in the streets named in its charter (*Railway Co. v. Williamsport*, 120 Pa. St. 1, 36 Am. & Eng. R. Cas. 125, A.D. 1888). This statement of the facts and law leads to these inquiries: Has the defendant the right to occupy Germantown avenue for an extension of its road, or as a connection between its tracks from Tenth to Eleventh streets? and, Is it under an obligation to obtain the consent of the city councils to the occupation of the public streets hereafter?

"Germantown avenue, at its junction with Tenth street, which is at a point about two hundred and fifty feet north of Cumberland street, runs almost due north, and occupies a part of the ground which would be taken for Tenth street, were it opened. But, as the necessity for opening Tenth street was avoided by the existence of Germantown road in its place, the legislature, by the act of April 6, 1848 (P. L. 359), vacated Tenth street, as the same is laid down in the plan of the city of Philadelphia, from its intersection with the Germantown road northward to Indiana street, running along the edge of the said Germantown road. Germantown avenue or road was formerly a part of the Germantown & Perkiomen Turnpike Road. At the time the defendant's charter was obtained (1858), and the date of its supplements (1863 and 1865), Germantown road was a turnpike owned by a company having a right to demand tolls for using it. It was not freed from tolls until 1869, when it became a public street, subject to municipal control. When the defendant company obtained its last grant of a right to extend its road, in 1865, we may presume that the legislation conferring the power to extend its road was draughted by its own agents, for its own benefit,

and with a view to give it further privileges without any expense which might be avoided. Any attempt to occupy Germantown road in 1865 would have been met with a demand by the turnpike company for compensation; for, while the legislature might authorize a railway company to occupy a turnpike road, it would have been subject to the constitutional terms of making compensation. Hence the grant was of authority 'to extend the road northwardly on Tenth and Eleventh streets between Montgomery street and the Germantown road, with the right to connect the same on any street between these two points, subject to all the limitations and restrictions and with all the privileges granted to the said company under their act of incorporation.' The right was to be exercised between Germantown road and Montgomery street. This word 'between' has different meanings, according to the use to which it is applied. In measuring space, it excludes the objects which bound it. Webster describes it, in this application, as 'the intermediate space of, without regard to distance,' and gives as an instance the phrase, 'New York is between Boston and Philadelphia.' So Pennsylvania is between New Jersey and Ohio, and the Delaware River is between New Jersey and Pennsylvania, but neither is part of the other. In *Revere v. Leonard*, 1 Mass. 91, there was a grant of a right to convey water through any dams, gates, etc., between a mill and a dam, and it was contended, if the grant could not be otherwise satisfied, it would be reasonable and equitable to construe the word 'between' so as to include the dam; but the court said that the words of the deed were necessarily exclusive of the termini, and that it was against all legal principles to go out of the deed to inquire into the meaning of those and like words; there being no ambiguity in them. In case of *State v. Godfrey*, 12 Me. 361, an act of the legislature authorized the construction of a dam between the foot of Rose's or Treat's falls and McMahon's falls, and it was contended that the words of the charter included McMahon's falls; but the court said 'that which lies between a given place and another is quite distinct from the place given on either side. Perhaps no word in our language has a more precise and definite meaning than "between." It indicates an intermediate space, which excludes and cannot include that to which it refers. If land is granted between one township and another, both are excluded from the grant. If land is conveyed, lying between lots number one and number three, it could not be pretended that either of those lots passed by the deed.' The word 'between,' in the charter of a railroad company, confines the road to the point from which it is authorized to be constructed. It cannot be carried beyond that

point. *Railroad Co. v. Colwell*, 39 Pa. St. 337. It has the same effect as a combination of the words 'from' and 'to,' as in the case of *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339, in which they were held to prevent the company from constructing its road into the place from which it was to be built. The same interpretation on similar words was given in the case of *Rex v. Inhabitants*, 6 Car. & P. 133. A like rule applies in proceedings to lay out roads, in which it is necessary for the viewers to follow the petition and designate the termini of the road as therein fixed. 'To go beyond them,' said the court, 'is to exceed the authority. * * * If they can go beyond one terminus, they may disregard the other.' *Road in Lower Merion*, 58 Pa. St. 66. It has been held that the right to construct a railroad across a street does not give the right to construct it diagonally across, for that would be along the street. *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150, A.D. 1880. Other cases show how strict is the construction put on this word, 'between.' It has been said that it must be the most direct line, and straight as it is possible to run it. *Leigh v. Hind*, 9 Barn. & C. 774; *Moufflet v. Cole*, 42 Law J. Exch. 8; *Brown v. Brown*, 6 Watts. 54; *Beale v. Patterson*, 3 Watts & S. 379.

"It is contended on behalf of the defendant that it can go upon Germantown avenue to make a connection between its Tenth and Eleventh street tracks. Its charter authorizes it to connect on any street between two points; that is, between Montgomery street and Germantown road. Now, it is undoubtedly true that the words, 'street,' 'road,' and 'avenue,' are synonymous, and are included in the more general designation of 'highway,' wherefore the fact that Germantown avenue was never called a street would not be of much importance, if it had been a public highway in 1865; but, as all charters are to be construed as of the date of their enactment (*Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339), when we consider that Germantown road was a turnpike road in 1865; that the legislature could not authorize the defendant to enter upon and lay its tracks on that turnpike without compensation; and that the defendant was looking for a public street or streets between Montgomery street and Germantown road, on which it could connect its road without further expense than the cost of construction,—it is not giving the charter too strict an interpretation to say that what the defendant wanted, and what the legislature gave it, was a public street, without cost or delay, and not a turnpike road, for which it would have been compelled to pay damages. That Germantown avenue has since become a public street does not bring it

Charter strictly construed.

within the view of the legislature at the time of making the grant, in 1865, when it was not a public street. Besides, a street cannot be between itself and another street or point. The order of the court of common pleas No. 1, upon the board of supervisors, to approve the plan of the defendant for laying its tracks on Germantown avenue, settled no rights. It was merely an order to approve the plan of constructing the road; the board having no power to determine whether the charter of the defendant gave it the right to occupy the avenue or not.

"On the other point, we are of opinion that the defendant is bound by its agreement with the city, made in compliance with the ordinance of April 16, 1858, to obtain the consent of the city councils to all future extensions of its road, as required by the ordinances of February 28, 1860, and May 7, 1869. This is in accordance, also, with the spirit of the constitution of 1874, which provides that 'no street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities.' The power to dispose of rights in the few remaining streets has been taken away from the legislature, and is now vested in the municipal authorities. Independent of this, a correct construction of the charter of the defendant, and its supplements, requires the defendant to have the municipal consent before occupying any more of the public streets. When a charter requires the consent of the city councils, and a supplement authorizes the extension of its road without consent, a second supplement, which is silent as to consent, is to be taken subject to the requirement of the charter that consent shall be obtained. *City of Philadelphia v. Lombard & S. S. P. R. Co.*, 4 Brewst. 14, A.D. 1866. This decision was made on a state of facts almost identical with those of the present case. While thus deciding against the defendant on the present state of facts. I may add that it is manifest that, as the city expands, it is becoming necessary, for the convenience of the people, that the road of the defendant should be extended; but it must be done by authority of law, and with the consent of the city councils."

John H. Sloan and David W. Sellers, for appellant.

Abraham M. Bietler, Charles B. McMichael, and Charles F. Warwick, for appellee.

STERRETT, J.—It is contended that the learned court erred in holding (1) "that the appellant corporation was not authorized to lay any track on Germantown avenue;" (2) "that the consent of the councils had not been given to appellant for the construction of the extension authorized by the act of

March 22, 1865." The facts of the case, in connection with the acts of assembly and ordinances of councils, relating to the questions involved in these specifications of error, are so fully presented in the clear and comprehensive opinion of the court below that extended reference to either is unnecessary.

It was clearly incumbent on the company to show its authority from the commonwealth to occupy Germantown avenue, either for the purpose of extending its road thereon, or making a connection between its tracks on Tenth and Eleventh streets. If that authority was not given, either in express terms or by necessary implication, the injunction restraining the

Authority to occupy street must be clearly shown.

"company from laying any tracks on, along, and upon Germantown avenue, from its junction with Tenth street, north, to Indiana street," etc., was rightly awarded. The act of March 25, 1858 (P. L. 166), incorporating the company to construct a passenger railway on Tenth and Eleventh streets, etc., to Columbia avenue, on the north, required, among other things, "that before the company shall use and occupy the said streets the consent of councils * * * shall be first obtained; and said consent shall be taken and deemed to have been given if said councils shall not, within thirty days after the passage of this act, by ordinances duly passed, signify their disapproval thereof; and the said councils may from time to time, by ordinance, establish such regulations in regard to said railway as may be required for the paving, repaving, grading, culverting, and the laying of gas and water pipes in and along said streets, and to prevent obstructions thereon." By the first section of an ordinance duly passed within the time specified, councils declared their disapproval of said act; but, in the second section thereof, it was provided that if the company shall within 90 days, and before using or occupying any of said streets, file in the office of the city solicitor a written obligation, binding the company to observe and be subject to all ordinances of the city in relation to passenger railways then in force or at any time thereafter to be passed, "then the provisions of the first section of this ordinance shall be of no effect." The obligation thus required was accordingly filed, and the company proceeded to construct its road.

The ordinance to which appellant thereby became subject, and bound itself to obey, required passenger railway companies, among other things, to conform to established street grades; to submit all plans, courses, and styles of rails to the board of surveyors for approval; to lay flagstones at crossings or intervals of 250 feet; to pave, repair, and repave the streets occupied by them; to keep said streets clear of snow; to run

their cars at a safe rate of speed; to pay license for each car run on the road, etc. In the same connection, the learned judge of the common pleas referred to ordinances of February 28, 1860, and May 7, 1869, prohibiting the department of highways from granting any permit to remove pavement for the purpose of laying passenger railway tracks, and prohibiting city surveyors from locating any such track until the consent of councils to the construction of the road has been given.

As we have already seen, the northern limit of appellant's right of way, under its original charter, is Columbia avenue. By act of April 11, 1863 (P. L. 319), the company was authorized to extend its tracks to Montgomery street, and connect them by a track on said street. Afterward, by act of March 22, 1865 (P. L. 568), it was further authorized, whenever and at such times as the public convenience may require, to extend its "road northwardly, on Tenth and Eleventh streets, between Montgomery street and Germantown road, with the right to connect the same or any street between these two points, subject to all the limitations and restrictions and with all the privileges granted to the said company under its act of incorporation. In pursuance of these acts the road was extended northwardly on Tenth and Eleventh streets to Cumberland street, and there connected by a track laid on said last-mentioned street. It was still further extended on Eleventh street, with a single track and turnouts, to Cambria street, four squares north of Cumberland street. Waiving for the present, and for argument's sake, merely, any question as to the consent of councils, or the necessity for such consent, that extension appears to be in accordance with the provisions of said acts; but it is claimed by appellant that the act of 1865 authorizes the further extension of its Tenth street line northerly on Germantown avenue to Indiana street, also the extension of its Eleventh street line to same street, and a connection between the thus extended lines by a track on said Indiana street.

The answer to this contention is that no authority can be found in said act, or elsewhere, to locate any part of its road on Germantown avenue. As defined by the very words of the act above quoted, the authority to Terms defined. extend northerly on Tenth and Eleventh streets is expressly limited to the portions of said streets, respectively, lying "between Montgomery street and Germantown road;" that is to say, between the north line of the former and the southerly line of the latter. The northerly limit of the grant is the southerly line of said road, and that necessarily precludes the right to enter upon and occupy any part of said

road. The word "between" indicates an intermediate space, which excludes, and cannot include, that to which it refers; in this case, the street and the road. If land be granted between one township and another, both are clearly excluded from the grant. If land described as lying between lot No. 1 and lot No. 3 is conveyed, it cannot be pretended that either lot, or any part thereof, passes by the deed. 2 Amer. & Eng. Ency. Law, 186. The word under consideration is sometimes used in a different sense, but it is too plain for argument that in the act in question it was employed in its primary and general signification, above stated. If it had been the legislative intention to include the Germantown road, or any part thereof, in the grant, it would have been an easy matter to clearly express it, and doubtless it would have been so done. To hold as contended for by appellant would require us to ignore the sound and well-settled principle that, in construing grants of power to such corporations, whatever is not given in clear and express terms or by necessary implication is conclusively considered to have been withheld. There appears to be a growing disposition on the part of some classes of corporations to reverse the principle, and arrogate to themselves the right to do anything that is not prohibited by their charters. No such tendency should be encouraged. For these and other reasons fully elaborated in the opinion of the court below, we think there was no error in ruling as complained of in the first specification.

The learned court was also right in holding that the consent of city councils has never been given to appellant to construct and operate the extension authorized by the act of March 22, 1865. The company's agreement with the city, binding it to obtain the consent of councils to all future extensions of its road, as required by the ordinances of February 28, 1860, and May 7, 1869, is undoubtedly in force, and does not appear to have been complied with. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

DOOLY BLOCK *et al.*

v.

SALT LAKE RAPID TRANSIT CO.

(Utah Supreme Court, June 5, 1898.)

Occupancy of Streets by Street Railways—Lot-owners' Rights of Access, Light, and Air.—When land is platted by the owner of the soil and lots sold bounded by a street designated and marked on the plat, the grantee acquires a right to the street in front of the premises as a means of access; and lot-owners cannot be denied the right of access, light, and air, although the fee to the street may be in the city in trust for the use of the public instead of in the abutting owners for street uses.

Same—Plenary Power of Legislature over Streets.—The legislature of a state has not such plenary power over all public ways and streets that it may, in the absence of constitutional restrictions, authorize municipalities to devote the entire width of a street to railway use, regardless of the property rights of abutting owners and without compensation for injury to their property.

Same—Encumbrance of Street—Injury of Abutting Owners—Statutes Construed.—The statutes of Utah authorizing a certain city "to exclusively control, regulate, repair, amend, and clear the streets," etc., to "open, widen, straighten, or vacate streets," and to "prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury," and also conferring upon the said city power "to direct and control the location of railroad tracks and depot-grounds within the city," will not be construed as authorizing the city council to grant a railway franchise, if the construction of the road will injure and materially depreciate the value of the property of the abutters. The city has no power "to direct and control" the location of the railway tracks in cases where the streets are already burdened to the extent that natural justice will allow, until a right of way has been condemned by the railway company.

Street Already Occupied—Right to Abutters to Enjoin Third Track.—Where, at the date of granting to a street-railway company a franchise to occupy a certain street, there were in operation upon that street two railway tracks, with a line of poles between them, also many electric-light and telegraph poles on each side of the street, the abutting owners may enjoin the construction of a third track, authorized by the city council, where it appears that the tracks already upon the said street afford ample facilities for running all cars necessary for public convenience, and the construction of a third track would be a serious impediment to the ordinary mode of travel.

Facts Found by Lower Court Conclusive in Appellate Court.—Although there was conflict in the evidence before the trial court, the findings of fact in that court, sitting as a court of chancery, are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake.

APPEAL from Salt Lake district court.

Parley L. Williams, for appellant.

Bennett, Marshall & Bradley, for respondents.

BARTCH, J.—The respondents are the owners of certain lots situate in Salt Lake City, and abutting on Second South street, between Main and Second West streets.

Case stated.

Two of these lots, one on the north, the other on the south, side of Second South street, are one block west of Main street, are business property, and at the time of the trial of the cause business blocks were being erected thereon. The complaint, in substance, charges that the plaintiffs were respectively the owners of that portion of the street which lies between the centre-line thereof and the front line of the said lots, subject only to the ordinary use of the public for the purposes of travel; that the plaintiffs are entitled to the free and unobstructed use of the street as a means of access to the said premises; that by authority of Salt Lake City the Salt Lake City Railroad Company constructed on that street a double-track railroad, with wires, poles, and other appurtenances necessary to operate the same with electric power; that the same was being so operated, and afforded all necessary means and convenience to persons who might have occasion to travel on street railroads; that telegraph and telephone-lines, and wires and poles for electric light, had been constructed on the street; and that by reason of the several uses with which it had thus been burdened the ordinary use thereof for public travel and ingress and egress to the several premises had become impeded and embarrassed; that on the 6th day of May, 1890, and after the said street had been burdened as aforesaid, Salt Lake City, by its council, granted the defendant herein authority to construct and operate, by electric power, a street railroad on said street from First East to Seventh West street; that because of the obstructions already existing thereon, and because another railroad was not necessary for public convenience, the resolution granting the franchise to the defendant was unreasonable and void; that, in pursuance of the authority thus granted, the defendant commenced the construction of a railroad, and threatened to complete the same unless restrained; and that another railroad constructed thereon with its equipments and operation, in addition to the already burdened condition of the street, would greatly depreciate the value of the plaintiffs' property, and injure its convenient use and enjoyment.

The defendant, in its cross-complaint, in substance alleges that it owns and operates various lines of street railroads in the city and remote parts thereof, and in densely populated localities in the eastern portion of the city; that for public convenience it should have a line through the business portion of the city, to connect with railway depots and other parts of the city lying west of Main street; that defendant

had no franchise connecting its eastern lines with the western portion of the city through the business part thereof, except the one on Second South street; and that in the granting of franchises the city has denied the right to parallel existing lines except in this instance.

The trial court, in substance, found the above allegations of the plaintiffs and defendant to be true, and, among other things, found as facts that the plaintiffs are the owners of equitable easements in fee of rights of access, ingress, and egress to their respective lots in front thereof in the street, and entitled to the free and unobstructed use of that portion of said street as a means of access, such easements extending along the street from the first north and south street east of said lots to the first north and south street west of such lots, the same being subject to the ordinary use of the street by the public; that the fee of the street is in Salt Lake City, in trust for street uses proper; that prior to the granting of said franchise by the city there were constructed and in operation on that street a double-track street railroad, telegraph and telephone-lines, wires and poles for electric lighting, and the street had already become greatly obstructed, and access to plaintiffs' property impeded and embarrassed; that because of the obstructions already existing upon the street the resolution attempting to grant the franchise to the defendant was unreasonable and void; that the two tracks in operation on said street were sufficient to satisfy the demands of public convenience, and there was no necessity for a third track; that its construction would greatly depreciate the value of plaintiffs' property, interfere with its convenient use and enjoyment, and they would thereby suffer irreparable damage; that Salt Lake City, in granting the franchise to defendant, did not act within its lawful authority, nor exercise reasonable discretion for the best interests or convenience of the public; that the two tracks were constructed and are being operated in front of said lots by the Salt Lake City Railroad Company, and are sufficient to permit the passage of all street cars necessary for public convenience, and between the third track, proposed to be constructed, and the sidewalk there would not remain sufficient space for the ordinary traffic of the street, free from unreasonable obstructions; that the defendant has electric street-car lines in operation in the eastern and western portions of said city, but has no other connecting line or franchise except the one on said Second South street passing through the business portion of the city, or reaching the depots of the several steam railroads, such connecting line being of great importance to the defendant, and necessary for the public

Findings of
trial court.

travel; that the defendant company and the Salt Lake City Railroad Company can operate both of their railways together by means of the two tracks of the last-mentioned company now on that street, which tracks afford sufficient track privileges for all the cars operated, or necessary to be operated, by both companies, for public travel and convenience; and that the construction and maintenance of a third track would be an unnecessary obstruction and interference with the ordinary use of the street, and the means of access to plaintiffs' premises would be unreasonably and materially abridged and injured.

Upon this state of facts the trial court granted an injunction perpetually restraining the defendant from constructing and operating a third track on said Second South street. The defendant moved the court for a new trial upon the following grounds: First. "Insufficiency of the evidence to justify the findings of the court and decree in said case, and that the same were against law." Second. "Errors in law occurring at the trial, and excepted to by the defendant." From the order overruling this motion the defendant appealed to this court.

This leads to the inquiry as to whether or not the construction and operation of the third track upon that street by the defendant involves the taking of property of the plaintiffs, and as to whether the city council of Salt Lake City exceeded its limits of discretion and authority in granting the franchise to defendant. The plaintiffs contend that they are the owners in fee of the lots above mentioned abutting on Second South street, and, as such abutting owners, they are entitled to so much of the bed of the street as lies immediately in front of the lots and to the centre of the street, on which the proposed third track is to be built, subject only to the ordinary use of the same for the purposes of public travel, and that they are entitled to the use of said street, free from unreasonable obstructions, as a means of access, light, and air to their premises. The defendant maintains that the fee of said street is vested in the corporation of Salt Lake City, and that plaintiffs have no property therein, but are only entitled to the use thereof in common with the people of the city. The plaintiff's admit that the fee is in the city, in trust, however, for street uses proper, and subject to the equitable easements in fee of abutters.

The lots and street in question are a part of a larger tract entered under section 2387 (Rev. St. U. S.), which provided that the corporate authorities might enter any portion of the public lands settled upon and occupied as a town-site, "in

Purchasers of
lots—Rights
of access,
light and air.

trust for the several use and benefit of the occupants thereof, according to their respective interests." Plaintiffs' lots were represented on the original plat of Salt Lake City as fronting Second South street, which was platted in said plat, and when they were purchased under the forms prescribed by the town-site act the grantees secured the right and privilege to have the street forever kept open. When land is settled upon and occupied as a town-site, and lots are sold, the right of way over the streets in front of such lots is an appurtenance of necessity, and it requires no special grant in the deed. *Ashby v. Hall*, 119 U. S. 526; *Salisbury v. Andrews*, 128 Mass. 336. The rights of access, light, and air constitute the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements. The right of the grantee to their use is precisely the same as his right to the property itself. Such privileges are easements in fee,—incorporeal hereditaments,—and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual encumbrance upon the land burdened with them. It follows that, when land is platted by the owner of the soil, and lots sold, bounded by a street designated and marked on the plat, the grantee acquires a right to the street in front of the premises as a means of access. 1 Hare, Const. Law, 376; Lewis, Em. Dom. § 114; *Story v. Railway Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596; *Wyman v. Mayor, etc.*, 11 Wend. 487; *Child v. Chappell*, 9 N. Y. 246; *Schulte v. Transportation Co.*, 50 Cal. 592; *City of Denver v. Bayer*, 7 Colo. 113.

Nor does it matter, in this case, that the fee is in the city in trust for the use of the public, instead of in the abutting owner in trust for street uses. Equally in both cases the abutting owners are entitled to the use of the street as a means of access to their lots, and for light and air. If the fee is in the city, the rights of the abutter are in the nature of equitable easements in fee; if in the abutter, they are in their nature legal. In either case the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements and materially diminish the value of their property. When the lots of plaintiffs were sold under the town-site act, above mentioned, it was in effect agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light, and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property

of which the owners cannot be deprived without due compensation. By implication, at least, the grantees also assumed additional burdens, for they must contribute of their own funds for the expense of sewer, gas, and water connections, and as well toward the cost of sidewalks, paving, and sprinkling in front of their lots. These are expenditures which devolve upon them as abutting owners, and, in addition to the relation of their lots to the street, give them a special interest in the street in front of their premises, distinct from that of the public at large. Assuming such burdens, they may of right make any and all proper uses of the street, subject to proper and reasonable municipal control and police regulations. *Lewis*, Em. Dom. § 115; 2 Dill. Mun. Corp. (4th ed.) §§ 556*a*, 556*b*; *McQuaid v. Railway Co.*, 18 Oreg. 237, 40 Am. & Eng. R. Cas. 308; *Haynes v. Thomas*, 7 Ind. 38; *Story v. Railway Co.*, *supra*. The right of municipalities to grant franchises to private corporations for the construction and operation of street railways, when empowered by the legislature so to do, is not now, it seems, an open question, although streets were originally not designed for that purpose, but were mostly confined to the right of public travel in the ordinary modes. Enlightened public policy, advanced civilization, and a desire to subserve public interest, have induced courts to become more lax in the enforcement of strict technical rules and principles in this regard, and it appears now to be well settled by judicial authority that a reasonable portion of a street may be devoted for the purposes of a street railway, and that such is a proper use of the street.

Counsel for appellant contended that, subject to a special constitutional restrictions, the legislature has plenary power over all public ways and streets. If this position be tenable, then, in the absence of special constitutional restrictions, the legislature may authorize municipalities to devote the entire width of a street to railroad uses, regardless of the property rights of abutting owners, without compensation for injury to their property. This theory does not appear to be sustained by the authorities. The legislature may delegate power over streets to municipalities, but in doing so it must recognize the property rights of private individuals. Judge Dillon, in his work on Municipal Corporations (volume 2, § 656*a*), speaking of the nature of streets and legislative control, says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, be-

Plenary power
of legislature
over streets.

cause they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of abutting owners, full and paramount authority over all public ways and public places."

It will be observed that the learned author distinctly recognizes "the property rights and easements of abutting owners," and, subject to these, the legislature "has full and paramount authority over all public ways and public places." Up to within a comparatively recent date, the current of judicial opinion drew a distinction between cases where the fee was in the abutting owner, subject to street uses proper, and those where the fee was in the municipality in trust for the use of the public. In the latter class of cases it was uniformly held that the power of the legislature to authorize the construction of a railroad on the street of a city was paramount, and that it could delegate such power to the local authorities. Of the exercise of this power the abutting owner could not complain, and had no right to compensation for injury to his easement caused by the appropriation of the street to such purposes. In the former class of cases he was entitled to compensation of the injury sustained by such appropriation. The case of *Railroad Co. v. Hartley*, 67 Ill. 439, supports this view. Mr. Justice SCOTT, in deciding the case, said: "A distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets, and where the fee remains in the abutting owner, and it seems to us that it rests on sound principle, and is supported by the highest authority." That case was decided in January, 1873, and such, it must be conceded, was the weight of authority at that time. Then the cases turned upon the question whether the fee was in the public or in the abutter, in many of them without close inquiry as to the exact limitation of the fee; and it was almost universally held that, if the fee was in the abutter, the legislature could not authorize a private corporation to construct a railroad on a public street without compensation to the abutter, and likewise it was almost universally held that, if the fee was in the public, the legislature could authorize the street to be used for such purpose without compensation to him.

Since then the whole subject has undergone deliberate reconsideration, and the weight of recent judicial decision seems to abrogate the distinction and treat the easements of abutting

owners as property rights forming part of the estate in the property, except in cases where the public owns the absolute fee of the street and the fee is not limited to street uses proper. In such cases the tendency is still to hold that the legislature, in the absence of special constitutional restraint, may authorize a railroad company to use the street of a city for its road-bed without compensation to the abutter. It might be observed, however, that even in this class of cases there seems to be no just or satisfactory reason why such a use of a street, which is specially beneficial to the grantee of the franchise, and causes a special injury to the abutter, should be within the absolute control of the legislature, without regard to the property rights of the abutting owner. Speaking of the nature of public streets and of the rights of the abutter and of the public, Judge Dillon (in section 656a, *Mun. Corp.*) observes: "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had, in common with the rest of the public, a right of passage. But it was also further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it; and that these rights, whether the bare fee of the street was in the lot-owner or in the city, were rights of property, and, as such, ought to be, and were, sacred from legislative invasion as his right to the lot itself." In support of this view of the question he cites, among numerous other cases, *Story v. Railway Co.*, *supra*, which is the leading recent case in New York on this subject. In this case Justice DANFORTH, after an elaborate and exhaustive review of the authorities, concludes: "In whatever way, therefore, we view the plaintiff's case, the result is the same—a right of property in the street, with which, until properly appropriated and compensation made, the defendant cannot intermeddle." 2 *Dill. Mun. Corp.* § 704; *Lahr v. Railway Co.*, 104 N. Y. 268; *Railway Co. v. Brown* (Fla.), 1 South. Rep. 512; *Mahady v. Railroad Co.*, 91 N. Y. 148, 14 Am. & Eng. R. Cas. 141; *Railroad Co. v. Reinhackle*, 15 Neb. 279,

14 Am. & Eng. R. Cas. 169; *Railway Co. v. Cummins*, 14 Ohio St. 523; *New York El. Ry. Co. v. Fifth Nat. Bank*, 135 U. S. 433, 43 Am. & Eng. R. Cas. 403; *Railroad v. Schurmeir*, 7 Wall. 272; *Theobald v. Railway Co.*, 66 Miss. 279, 38 Am. & Eng. R. Cas. 432.

In this case the learned court found that the fee of Second South street is in Salt Lake City, in trust for street uses proper; and of this appellant does not complain. Therefore, under the law as applied to this class of cases, plaintiffs have property rights in the street in front of their lots, and the street is not subject to the absolute control of the legislature, nor can the legislature confer such control upon the city council. While the legislature can authorize municipal authorities to permit private corporations to construct and operate street-railway lines upon the street, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to materially injure the property of abutters.

And this leads to a consideration of the power exercised in this case. Did the city council, in granting the franchise, act within the scope of its authority, and with a reasonable exercise of discretion? Section 340, 1 ^{Statutes construed.} Comp. Laws Utah, 1888, authorizes Salt Lake City as follows: "To exclusively control, regulate, repair, amend, and clear the streets," etc., "and open, wide, straighten, or vacate streets," etc., "and prevent the incumbering of the streets in any manner, and protect the same from any encroachment and injury." If "to exclusively control the streets" were taken alone and construed literally, it might confer plenary power, and then, if this were not subject to judicial control, the abutting owners could have no redress, though the injury to their property, caused by acts of the city council, might be very great, but it is also provided to "prevent incumbering of the streets in any manner, and to protect the same from any encroachment and injury;" and this is just what respondents ask for in this case. It is apparent from this section that the legislature intended to confer no power that would injuriously affect the property rights of abutting owners. Subdivision 5, § 389, *Id.*, referring to the powers of Salt Lake City, provides: "To direct and control the location of railroad tracks and depot-grounds within the city, and regulate or prohibit the use of locomotive engines thereon, and may require the cars to be used within the inhabited portions thereof to be drawn or propelled by other power than that of steam." This is the statute law of this territory, relied on by counsel for appellant, as applicable to this case. Construed in the light of reason and justice, these enactments

do not authorize the city council to grant a railroad franchise if the construction of the road will injure and materially depreciate the value of the property of abutters. When the railroad company has obtained, under the law of eminent domain or otherwise, in cases where the streets are already burdened to the extent that natural justice will allow, a right of way, then the council has the power "to direct and control" the location of the tracks.

According to the evidence, as appears from the record in this case, Second South street is one of the principal business streets running east and west, and at the date of the granting of the franchise to the defendant and of the trial of the cause there were in operation upon that street two railroad tracks, which were located in the centre of the street, with a line of poles between them. There were also many electric-light, telegraph, and telephone poles placed in line on each side of the street about four feet from the sidewalk, and on these poles were stretched numerous electric wires. The two tracks in operation were constructed with T-rails, which project several inches above the surface of the street, and render the crossing of the tracks with vehicles difficult and dangerous, the street not being paved. The appellant proposed to construct its track in a similar way on the north side of the present tracks, and to erect additional poles, which would still further obstruct the ordinary travel, and render the respondents' property less accessible for business purposes. The tracks already upon said street afford ample facilities to run all the cars necessary for public convenience; and the construction of the third track would be a serious impediment to the ordinary mode of travel, as it would not leave sufficient space between the outside rails and the gutter for vehicles to pass each other with safety. Where the track privileges of one company on a city street are sufficient for the business of two or more companies, they should all be required to use them in common. The construction of an additional track, under the circumstances of this case, would be an unnecessary obstruction to and interference with the ordinary use of the street, and a special injury to the property rights of the abutters, and on proper application a court of chancery may grant injunctive relief. In such a case an abutting owner need not stand by and see his property injured without having any means of redress. Dill. Mun. Corp. § 661; *Uline v. Railroad Co.*, 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3; *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207; *Pond v. Railway Co.*, 112 N. Y. 186; *Story v. Railway Co.*, *supra*.

Counsel for appellant insist that the several findings of fact

Obstruction of
street to detri-
ment of abut-
ting owners.

to the effect that the construction of the third track would be an unreasonable obstruction of the street, and that the granting of the franchise for that purpose by the city council was unlawful, and an unreasonable exercise of discretion, are not justified by the evidence. There appears to be some conflict in the evidence on this point; but, the learned judge having heard the evidence, and having had the opportunity to observe the manner and bearing of the witnesses while testifying, this court will not disturb the conclusions reached, especially since the record shows them to be fair and logical deductions from the testimony. Where a case is tried in a court sitting as a court of chancery, the findings of fact are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake. *Wells v. Wells* (Utah), 24 Pac. Rep. 754; *Ullman v. McCormic*, 12 Colo. 553; *Doe v. Vallejo*, 29 Cal. 386; *Coryell v. Cain*, 16 Cal. 567; *Coolidge v. Smith*, 129 Mass. 554.

Facts found in lower court conclusive in appellate court.

The record reveals no material error committed during the conduct of the trial, and we are of the opinion that the act of the city council of Salt Lake City granting the franchise to the appellant was unlawful, as being an unreasonable exercise of discretion, and is therefore of no avail to it.

The judgment is affirmed.

Street Railway as an Additional Burden on the Land—Rights of Abutters.—See *Nichols v. Ann Arbor & Y. St. R. Co.* (Mich.), 50 Am. & Eng. R. Cas. 250; *Van Horne v. Newark Pass. R. Co.* (N. J.), 50 *Id.* 235, and cases cited in note, 239; *Rafferty v. Central T. Co.* (Pa.), 50 *Id.* 239; *Koch v. North Ave. R. Co.* (Md.), 50 *Id.* 401; *Detroit C. R. Co. v. Mills* (Mich.), 46 *Id.* 608.

In *Elfelt v. Stillwater St. R. Co.* (Minn., April 24, 1893.), 55 N. W. Rep. 116, it was held that a street railway imposes no additional servitude upon a street. The court said: "This court has always recognized the distinction between an ordinary commercial railway and a street railway, in respect to laying them upon a street. The former imposes an additional servitude on the street, while the latter, being only a mode of using the street for legitimate street purposes, does not."

In *Deane v. Ann Arbor St. R. Co.*, 93 Mich. 330, it was held that the use of a street by an electric railroad with overhead wires and poles was not an additional servitude for which abutting owners could demand compensation, citing *Railway Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608; *People v. Fort Wayne & E. R. Co.*, 92 Mich. 532, as the settled law of the state.

Street Railways—Injury to Abutting Property—Damages.—In *Brady v. Kansas City Cable R. Co.*, 11 Mo. 329, it was held that the fact that abutting property was ten feet above the grade of a street through which a cable-road was constructed, did not prevent the owner from recovering damages where the grade was lowered ten feet.

Destruction of Street by Construction of Viaduct—Compensation to Abutters.—In *Spencer v. Metropolitan St. R. Co.* (Mo., June 27, 1893.), 23 S. W. Rep. 126, it was held that the construction of a viaduct by a street-

railway company, so as to prevent the use of a street by abutting owners, was the taking of private property for public use, for which compensation must be made under the constitution. The court said: "This is not a proceeding to condemn private property for public use by the exercise of the power of the right of eminent domain, but is simply an action *ex delicto*, and is not like the laying of a railroad track on the surface of a street, thereby imposing an additional servitude, or making a new and improved public use thereof. It amounts to a total destruction of the street. The street, having been dedicated to public use for ordinary purposes, could not be lawfully appropriated to another, distinct and inconsistent, public use. *Belcher Sugar-refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, 5 Am. & Eng. Corp. Cas. 417, and authorities cited. While contrary opinions have been maintained with great ability in courts of other states, and by elementary writers of much distinction, the rule in this state is well established that in cases of this kind, in estimating benefits, the jury should be restricted, in estimating such benefits, to peculiar and direct benefits, or increase of value, as result to the lots in controversy, in which other lots in the same locality do not participate. The advantages to be considered by the jury are such as particularly affect the lots of plaintiffs, and are not advantages of a general nature, which the plaintiffs, in common with their neighbors, whose lots are not damaged, derive from the construction of the viaduct. *Lee v. Railroad Co.*, 58 Mo. 178; *Hosher v. Railroad Co.*, 60 Mo. 303; *Combs v. Smith*, 78 Mo. 32; *Railroad Co. v. McGrew*, 104 Mo. 282, 47 Am. & Eng. R. Cas. 131, and authorities cited. The right of the plaintiffs to the use of the street adjoining their lots is as much property as the lots themselves. *Lackland v. Railroad Co.*, 81 Mo. 180; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Railway Co.*, 94 Mo. 574, 32 Am. & Eng. R. Cas. 233; *Chicago v. Taylor*, 125 U. S. 165, 22 Am. & Eng. Corp. Cas. 384; *Tate v. Railway Co.*, 64 Mo. 149."

Railway Company Liable for Injury Done by Contractor Excavating Street.—In *Brady v. Kansas City Cable R. Co.*, 111 Mo. 329, it was held that, where a contract for excavating a street for a cable-road was made in the name of a third person, at the instance of the defendant company, the work being paid for out of the defendant's funds, and the benefit of the work being enjoyed by it, the defendant was liable for damages resulting therefrom.

ONSET STREET R. CO.

v.

COUNTY COMMISSIONERS OF PLYMOUTH COUNTY.

(154 *Massachusetts*, 395.)

Street Railway — Easement of Lot-owners — Right to Compensation.—The owners of lots abutting on a platted street have such easements in fee therein that they are entitled to damages for any obstruction of the street, even though the soil is owned by another; and where a land company changed the grade of a street and built and operated a steam-motor railway therein, without legislative authority, and subsequently a railway company was incorporated and authorized to acquire the track already laid, on condition that compensation be made to the lot-owners for all

damages incurred by the building and operation of the road, *Held*, that the use of the track by the railway company made it liable for such damages, without any formal taking or seizure of the property.

Joint Petition of Lot-owners for Damages—Certiorari.—Separate lot-owners abutting on a street, the grade of which was changed for the purpose of operating a railway thereon, have the right, under the Massachusetts statutes, to join in one petition to the county commissioners for the assessment of joint or several damages; and the question whether such lot-owners had suffered any legal damage from the construction and operation of a railroad is a question of fact to be determined by the county commissioners, whose findings will not be revised on *certiorari*.

Same—Separate Distress Warrants.—Where separate lot-owners join in one petition for damages, separate distress-warrants may issue to enforce the damages awarded to each of them.

CASE reserved from Suffolk supreme judicial court.

A. Hemenway and *W. Schofield*, for plaintiff.

H. Kingman, for defendants.

BARKER, J.—This is a petition for a writ of *certiorari*, heard by a single justice, and reserved for the determination of the full court. The petitioner, a street-railway company, complains that warrants of distress have Case stated. been issued by the county commissioners of Plymouth county for land-damages awarded to owners of lots which abut on streets through which its railway is constructed. The persons claiming damages acquired the titles of their respective lots from the Onset Bay Grove Association. This was a corporation, chartered by St. 1877, c. 98, for the purpose of holding personal property and real estate where a wharf, hotel, and other public buildings may be erected, and building-lots sold for the erection of private residences, under such rules and regulations as the association may prescribe, and subject to the general laws applicable to such corporations. It bought the territory in Wareham known as "Onset and Riverside," and caused maps of the same to be recorded in the Plymouth registry of deeds, on which were shown lots, streets, avenues, etc. Each lot was numbered on the plans, and as conveyed by a separate deed, in which the only description was, "Lot numbered —, on a plan of lands of Onset Bay Grove Association, recorded," etc., "as the same is set out on said plan." After the owners had thus acquired title, the association built and operated by steam-power in the avenue on which their lots were situated a railroad, changing to some extent the grade of the avenue. This was done without legislative authority. No location of the railroad was filed, but it was built and in use by the association before June 16, 1886, the date of the petitioner's charter. By this charter (St. 1886, c. 285) the petitioner was empowered "to construct, maintain, and use a railway, with convenient double or single tracks,

upon and over such streets and highways in the town of Wareham as shall be from time to time fixed and determined by the selectmen of said town; and upon and over the ways and territory of the Onset Bay Grove Association, a corporation duly established in said town, by consent of said association: provided, all damages incurred by the owners of the fee in any of said last-mentioned ways and territory by the taking of any part of said ways or territory for the building of said road shall be settled by said company, as is provided in chapter one hundred and twelve of the Public Statutes." The charter also gave specific authority to "purchase or lease the tracks already laid upon the lands of the Onset Bay Grove Association upon such terms as may be mutually agreed upon," and authorized the transportation of freight as well as passengers upon the railroad, and its operation by animal-power, the Baldwin (steam) motor, or any other motive power which the selectmen of Wareham may permit.

Pursuant to this authority, the petitioner, on December 31, 1886, entered into an indenture with the Onset Bay Grove Association, which conveyed to the petitioner a right of way over the lands and streets of the association in Onset and Riverside, shown on the plans mentioned, "according to the rules and measurements of the track of said railway company as they are now actually located and constructed." The petitioner covenants to save the association harmless from all damages lawfully recovered from or suffered by it by reason of the location or use of the tracks in any place within the territory. The indenture states that nothing in it shall be construed to impair or conflict with the rights of any purchaser of land abutting on the line of the railway, the conveyance of which had been already made or agreed upon. Since its execution the petitioner has used the railroad in accordance with the terms of the indenture and of its charter. The railroad so used is the same which had been built and used by the association. The petitioner has done nothing to affect the property of the land-owners, save to accept the indenture and use the railroad under the indenture and its charter. On July 11, 1887, the claimants to whom damages were awarded joined with others in a petition to the county commissioners, alleging ownership in fee of lots shown upon the plan, and that the railway company had constructed its railway over the avenues on which the lots were situated, and asking damages. The railway company objected to the jurisdiction of the commissioners, and claimed that the owners were improperly joined in one petition, and that there was no sufficient allegation of their ownership, or of any taking of their property. At the hearing the commissioners held as matter of

law that the deeds conveyed to the grantees a title as owner in fee to the middle of the avenue, found that some of the claimants were entitled to damages and that others were not, and on May 8, 1888, awarded separate damages, with costs, to nine of the owners. No jury was applied for, and, the damages not having been paid, the commissioners, on August 6, 1889, issued separate warrants of distress. The petitioner's property was seized on these warrants on August 10, 1889, and thereupon this proceeding was brought. The return of the commissioners shows that the only evidence of a "taking" by the railway company was the indenture of December 31, 1886, and the actual use of the tracks therein mentioned, which were laid by the association before passage of the railway company's charter.

The claim which lies at the foundation of the petitioner's case may be first considered. It is, in substance, that the commissioners had no jurisdiction of any claims of the land-owners for damages, because it had not taken any of their land, but had only purchased or leased, by the indenture of December 31, 1886, the tracks already laid by the association. This claim is unsound. All that was made necessary by its charter to render the railway company liable to settle, in the way provided by chapter 112 of the Public Statutes, damages incurred by an owner in fee of any of the territory by the taking of any of the ways for the building of the railroad, was for the company to use the railroad. This is the plain intention of the fourth and ninth sections of its charter, when construed in the light of the existing facts.

The situation was this: The Onset Bay Grove Association had, without legislative authority, built and was operating a steam railroad in Wareham. The railroad was in streets in which the owners of abutting lands had easements in fee, even if the association owned the soil, and these easements were obstructed and interfered with by the railroad. Whether or not it was a public nuisance, its use was liable to be stopped by the individuals whose property it injured. The charter of the petitioner, and its use in accordance with the charter of the railroad under the indenture of December 31, 1886, had the effect of legalizing the maintenance of the railroad and its operation in a reasonable manner, and must have been so intended. The charter and the acts of both corporations are to be construed in the light of this situation. The railway company was explicitly authorized to purchase or lease the tracks already laid, and the expressed condition of its use of them was that it should settle, as provided in the statute, all damages incurred by land-owners by the taking of any part of the

Easement of
lot-owners.

ways for the building of the railroad. The charter neither calls for nor contemplates any formal or documentary "taking" or seizure of property by the railway company, in order to make it liable to settle the damages contemplated in the proviso of section 4. It does require it to settle them, in a particular manner, as a condition of its right to maintain or use the road already laid. The petitioner used the railroad mentioned in this condition, and thereby gave the respondents jurisdiction to award to any owner of the fee in any part of the territory any legal damages incurred by him by the taking or use of the ways for the building of the railroad. The phrase, "ways and territory of the Onset Bay Grove Association," in section 4 of the charter is clearly intended to indicate the territory known as "Onset and Riverside," and the ways there laid, and not to designate real estate or property of the association. The land-owners who asked the respondents to assess their damages were "owners of the fee," for whose benefit the proviso was enacted. If in point of fact they had incurred legal damages by the using of the streets for the building of the railroad, the commissioners had jurisdiction to estimate and award them.

The joinder in one petition to the county commissioners of different persons owning separate lots is authorized by the provision of Pub. St. c. 49, § 34: "That if two or more persons apply to the commissioners at the same time for joint or several damages or indemnity, they may join in the same petition." The commissioners, therefore, had jurisdiction of the parties and of their dispute under a proper petition, and whether the claimants were entitled to damages depended upon the question of fact to be tried, whether they had suffered legal damages. This court will not upon a petition for *certiorari* attempt to revise the finding of commissioners upon such a question of fact. *Water Power Co. v. Commissioners*, 112 Mass. 206. The writ is not granted in any case as matter of right, but is in the discretion of the court, which must be satisfied that substantial justice requires it. It will not be issued to correct merely technical errors, especially such could have been otherwise remedied; nor unless the petitioner has pursued his remedy without laches. If incompetent evidence has been admitted, or an erroneous ruling made, and the petitioner's rights are not really prejudiced, and the court can see that the decision was substantially correct, and worked no injustice, it will not interfere by granting the writ. *Cobb v. Lucas*, 15 Pick. 1; *Gleason v. Sloper*, 24 Pick. 181; *Whately v. Commissioners*, 1 Metc. (Mass.) 336; *Water Power Co. v. Commissioners*, *ubi supra*. In view of

Joint petition
of lot-owners
—Separate
warrants.

these principles, the issuing of separate warrants of distress, if irregular, would not authorize the granting of the writ. It does not touch the merits of the controversy, and, as the costs were divided, worked no injury to the petitioners. But we are of opinion that the issuing of separate warrants of distress was within the power of the commissioners. Their proceedings in such cases are governed, in the absence of prescribed rules, by common sense. In cases of the joinder in one petition of several persons claiming damages to separate estates, separate warrants may be necessary to prevent a failure of the remedy. It is analogous to the granting of separate judgments in cases tried together before a sheriff's jury. *Lanesborough v. Commissioners*, 22 Pick. 278-281; *Wyman v. Railroad Co.*, 13 Metc. (Mass.) 316; *Warner v. Franklin*, 131 Mass. 348. Also to the issuing of several executions upon one judgment in cases of suit upon probate or other bond.

It remains to inquire whether any substantial injustice appears to have been caused by the rulings of the commissioners in determining the question of damages. While it is settled that the construction of an ordinary street railway over a public way is not an additional servitude for which owners are entitled to compensation without special provision therefor (*Attorney-General v. Railroad Co.*, 125 Mass. 515; *Pierce v. Drew*, 136 Mass. 75, 8 Am. & Eng. Corp. Cas. 83), the petitioner's charter contains, as we have seen, a special provision that it shall settle all damages caused by the taking of the streets for the building of this railroad. Aside from this, we are of the opinion that it cannot be said as a matter of law that the building and use of a railroad operated by steam-power in transporting both freight and passengers in close proximity to dwellings in a village designed and used as a seaside summer resort, and in a street in which the owners of the abutting lots have right of way and other easements in fee which may be obstructed by the railroad, is not an injury to such owners. Whoever owned the soil of the avenue in which the railroad was built, the abutting land-owners were seized in fee of an easement in the avenue, under which they were entitled to its free and unobstructed use in connection with their estates. This easement was appurtenant to their lots, and its interruption or impairment was a damage to their lands. *Dodge v. Commissioners*, 3 Metc. (Mass.) 380; *Parker v. Railroad Co.*, 3 Cush. 107; *Walker v. Railroad Co.*, 103 Mass. 10; *Rodgers v. Parker*, 9 Gray, 445; *Story v. Railroad Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596.

But it is claimed by the petitioner that the ruling that the deeds conveyed a title in fee to the middle of the avenue was

erroneous, and the respondents do not now argue that it was correct. We do not find it necessary to consider whether this ruling was correct. It is clear that, whoever may own the soil of the avenue, no one is entitled to its exclusive occupation. The respondents could not have made their estimate and award upon the basis that the lot-owners were entitled to compensation for the value of the land covered by the tracks. Upon every theory it was part of an avenue for travel, and subject to easements which would prevent any use inconsistent with its being an open and common street. Whether, therefore, what the commissioners call the "fee" was thought by them to have been in one party or the other, can have made no substantial difference in their estimation of the damages, which, upon the theory that the avenue must be kept open and unobstructed for common use as a street, must have been determined in view of the injury to the lots by reason of the obstruction of the way and its change of grade. This view is strengthened by the facts that none of the awards are large, and that no damages were awarded to some of the claimants, and that the awards do not vary in amount in proportion to the size of the lots. We see nothing to indicate that this ruling, which was but one of several elements entering into the award, has resulted in any substantial injustice to the petitioner.

Petition dismissed.

BLAGEN

v.

THOMPSON *et al.*

(Oregon Supreme Court, Dec. 12, 1892.)

Street Railway—Sale of Franchise—Corporate Contract not Part of Individual Contract by Stockholders.—An executory contract made by a railway corporation in its corporate capacity for the sale to another railway company of certain franchises, with an agreement to secure and transfer additional rights of way over designated portions of the route of a proposed motor-line, and an executed contract of sale of the entire stock of the former corporation, made by the plaintiff and his associates as natural persons acting in their individual capacity, cannot be construed as one contract, although the plaintiff and his associates were the stockholders, directors, and officers of the corporation at the time the first contract was made; and the plaintiff was under no obligation to procure or furnish the rights of way in question or answer for the default of the corporation, if any occurred in so doing.

Same—Requirement that Grantee Complete Line.—A stipulation in the contract by which the plaintiff transferred the stock of his corporation required the purchasing company to complete its railway within a specified time, over the route for which plaintiff's corporation had agreed to secure the rights of way. *Held*, that the failure of the plaintiff's company to secure the designated rights of way was no defence to an action by the plaintiff for a breach of the agreement to construct the railway.

Same—Damages for Breach of Contract—Consequential Damages.—Where the defendants agreed with the plaintiff to build the proposed railway within a certain time to land which the plaintiff had purchased and divided into building-lots, and to sell tickets to residents and property-owners on the said land at a specified rate, it must be presumed that the loss of profits on account of failure to dispose of the lots, which would result from a neglect to construct the proposed railway, was within the contemplation of the parties at the time the contract was made; nor did the fact that the plaintiff surrendered and cancelled his contract after the franchises under which the defendants proposed to build the road had been revoked by the city authorities prevent him from maintaining his action.

Measure of Damages.—The rule for the measure of damages in this case, for breach of the contract sued on, was the difference in value of the land without the road on the day on which the proposed railway would have been completed according to the contract—not less in amount than the price the plaintiff agreed to pay for it—and what its value would have been on that day with the road completed and in operation.

Same—Opinion Evidence.—In a case where the amount of recovery depended upon the difference in value of the land in its present condition and what it would have been worth if the defendants had complied with their contract and built the motor-line as they agreed to do, the opinions of witnesses qualified to speak upon the subject were admissible in evidence as to what the land would have been worth with the conditions changed.

APPEAL from Multnomah circuit court.

This is an action to recover damages for breach of contract. The facts are that on March 26, 1890, a written contract was entered into between plaintiff and J. H. Lambert and wife, by the terms of which he purchased of them about 255 acres of land near the town of Milwaukee, and some three or four miles south of Portland, for the sum of \$150,000; he paying to them the sum of \$10,000 in cash, and agreeing to pay the further sum of \$15,000 on or before October 7, 1890, and the remainder of the purchase-price on or before five years from the date last named. This property was purchased by plaintiff for the purpose and with the design of subdividing it into lots and blocks, and selling it for suburban residences. About the same time plaintiff, desiring to build a motor-line from East Portland to the property, for the purpose of making it accessible and otherwise developing the same, purchased, for \$5000, all the subscribed stock of the Portland, Sellwood & Milwaukee Railway Company, a corporation organized to build such road, and the owner of certain franchises and rights of way on certain streets in East Portland and Sellwood, and along the county-road between said towns,

and commenced to have the route of such road surveyed and located for the purpose of constructing a motor-railway to and across the land so purchased by him of Lambert. On the same day this survey was commenced, certain other surveyors, acting for defendants, who claimed a right to build a road along the same route, appeared upon the ground, and commenced to survey another line along the county-road, covering the line staked out by the Portland, Sellwood & Milwaukee Railroad Company. Plaintiff then sought an interview with defendants, and negotiations were begun between them which finally resulted in a written proposition, of date April 4, 1890, from defendants to the Portland, Sellwood & Milwaukee Railroad Company, that if it would transfer to them its rights and franchises to construct and operate a motor-line on certain streets in East Portland, and the right of way as surveyed by it from East Portland to the Lambert farm, except over two or three pieces of land, without any restrictions as to charges over said motor-line (except as to residents and property-owners on lands of Lambert near Milwaukee), which is limited to 20 tickets for \$1, and to be completed by October 31, 1890), they would pay to it, when the franchises and rights of way should be transferred free from all incumbrances, the sum of \$6000 (that being the amount plaintiff had paid for the stock and the company had expended for work on the proposed road), and the costs of all labor in grading and clearing the right of way since April 1, 1890.

This proposition was accepted by the company, and on April 5, 1890, a written contract was entered into between it and the defendants, by which the company was to sell and the defendants to purchase, on or before May 19, 1890, all its franchises and rights of way for said motor-line, for the sum of \$6000 and the cost of all labor performed by it upon the road, in grading and clearing the right of way, until the defendants should take charge of the construction of the road. The defendants also agreed in said contract to complete and have in operation the said railway, along the line of survey as made by the said company, from its terminus in East Portland to the south line of the Lambert place, by October 31, 1890, and to furnish transportation to residents and property-holders on said place, to and from Portland, to the south line of the Lambert place, at the rate of 20 tickets for \$1, and to stop at three places on said land, to be designated by Lambert or his assigns; and the corporation agreed, on its part, to secure and convey to defendants, on or before the time fixed in the contract, said rights of way and franchises, without restriction, except as aforesaid, from the south

boundary-line of East Portland to the south line of the Lambert place, excepting the rights of way through two or three pieces of land, which the defendants were to secure for themselves.

This executory contract between defendants and the corporation seems never to have been carried out, but for some reason it was thought best, in place of transferring to defendants the franchises of the company, as agreed upon, to sell and transfer to them all the stock in the company; and consequently, on May 12, 1890, the contract, for the breach of which this action was brought, was entered into between defendants and plaintiff, Lambert, Brown, and Cake, who held certain stock in the corporation in trust for plaintiff, by which the latter sold to the former all the stock of the company, and agreed upon demand to transfer the same on the books, which contract, omitting the signatures of the parties, is as follows: "Memorandum of agreement made between D. P. Thompson, J. H. Smith, and W. E. Post, the parties of the first part, and N. J. Blagen, J. H. Lambert, C. W. Brown, H. M. Cake, and B. F. Smith, the parties of the second part, witnesseth, that in consideration of \$6539.30, to them in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants of the said D. P. Thompson, J. H. Smith, and W. E. Post, herein contained, the parties of the second part hereby sell, assign, and transfer their stock in the Portland, Sellwood & Milwaukee Railway Company, and agree to, upon demand, assign their stock upon the books of said company, to the said D. P. Thompson, J. H. Smith, and W. B. Post, hereby declaring that they own the number of shares as follows: N. J. Blagen, 1403 shares; J. H. Lambert, 200 shares; C. W. Brown, one share; H. M. Cake, one share; B. F. Smith, ——— shares. And the said D. P. Thompson, J. H. Smith, and W. E. Post hereby agree, in consideration of the above, that they will construct, in a first-class manner, complete, and have in operation, a steam-railway motor-line along the route surveyed by the said railway company, from its terminus in the city of East Portland to the south line of J. H. Lambert's place, by the 31st day of October, 1890 (delays caused by unavoidable injunction proceedings excepted). *Second.* That they will furnish transportation to residents and property-holders in the said tract of land known as the 'Lambert Place,' by a railway-motor line along the route surveyed by the said railway company to the city of Portland, from any stopping-places or stations established on the said Lambert place on the line of the said motor-road, and from the city of Portland to any of the stopping-places or stations on the said Lambert place, at the rate of 20 tickets for \$1, and that all trains shall stop at three places

or stations on the said Lambert place, to be designated by the said J. H. Lambert or his assigns. *Third.* That they will carry out and fulfil all the obligations imposed upon the said Portland, Sellwood & Milwaukee Railway Company by the written and express terms of franchises granted to said company. In witness whereof, the parties to these presents have hereunto set their hands and seals this 12th day of May, 1890."

The plaintiff and his associates fully complied with the terms of this agreement on their part to be performed, and did on July 7, 1890, duly transfer on the books of the corporation all their their stock to defendants, and the same has been ever since retained by them. The defendants wholly failed and neglected to build said motor-line, or any part thereof, and on September 1, 1890, the city of East Portland, by ordinance, revoked the franchises theretofore granted by it to the Portland, Sellwood & Milwaukee Railway Company to construct its road upon the streets of the city. Meanwhile, however, plaintiff, relying upon the contract of defendants to build the road, had caused a large portion of the Lambert place to be cleared off and surveyed into lots and blocks, and had sold about 100 lots for the aggregate sum of \$18,693.35; the purchasers paying therefor in cash a small part of the purchase-price, and agreeing to pay the remainder thereof, to wit, \$14,797.25, in deferred instalments. Under these circumstances, the second payment from plaintiff to Lambert was about to fall due; and perceiving that defendants did not intend to build the road within the time agreed upon, and could not do so, because the franchises granted by the city of East Portland had been revoked, and that consequently he could sell no more lots, and would probably be bankrupt, unless he could induce Lambert to release him from his contract of purchase, he applied to Lambert for a release and cancellation of his contract, and did on September 30, 1890, obtain such release, upon the best terms possible, which was the forfeiture of the cash payment of \$10,000 and the surrender to Lambert of all notes received by him for deferred payments on lots sold.

After the time in which defendants agreed to construct and have in operation the motor-line had expired, plaintiff procured from Lambert, Brown, and Cake an assignment to him of all their rights under the contract of May 12, 1890, and of their right of action against defendants for the breach of said contract, and thereafter commenced this action to recover \$146,001.96 damages. In his complaint he avers that at the time of entering into the contract of May 12th, and as a consideration and inducement for the execution thereof, the defendants were informed and well knew that he had pur-

chased the Lambert land with the intention of subdividing the same into lots and blocks, and of causing said railway motor-line to be constructed from Portland to and across the land, in order to enhance the value thereof, and to enable him to sell the same for a profit which would thereby accrue to him, and that relying upon the promise and agreement of defendants, as contained in said writing, he cleared, surveyed, and platted a portion of the land, and disposed of the lots mentioned; that, if the road had been built as agreed upon, the land would have been worth on October 31, 1890, the sum of \$323,657.15, but, by reason of the failure of defendants to keep and perform their contract and construct said road, he was disabled from completing his contract with Lambert for the purchase of the land, and was forced to and did lose the sum of \$17,139.66 paid on the purchase-price, and was unable to sell any more of the property, by which he was further damaged in the sum of \$128,862.30, which would have been the net profits on the remainder of said lots and land on the 31st day of October, 1890, if defendants had built the motor-line as they agreed to do.

The defendants allege in their answer, as an excuse for not building this road as they agreed to do, that the contracts of April 5th and May 12th were executed for the same consideration and to accomplish the same purpose and impose the same obligations and liabilities upon the defendants, and that neither the plaintiff nor the corporation has received or transferred to them the rights of way mentioned in the contract of April 5th, and therefore, without any fault or neglect on their part, they were and are wholly unable to build the road as provided in said agreements.

The trial in the court below resulted in a verdict and judgment in favor of the plaintiff for the sum of \$25,000, from which defendants appeal, and assign error in the admission of testimony and the giving and refusal of certain instructions by the trial court.

J. F. & E. B. Watson, for appellants.

E. C. Bronaugh, W. D. Fenton, and Cake & Cake, for respondent.

BEAN, J.—1. It is contended by counsel for defendants that the contract of April 5, 1890, between the Portland, Sellwood & Milwaukee Railway Company in its corporate capacity and defendants, in which the corporation agreed to procure the rights of way therein mentioned, should be construed and treated as part of the contract of May 12, 1890, entered into between defendants and plaintiff and his asso-

Corporate contract not part of individual contract.

ciates in their individual capacity, so as to hold them responsible for the failure, if any occurred, on the part of the corporation, to fulfil its agreement as to procuring such rights of way. When two written contracts are entered into between the same parties concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and interpreted together. *Dean v. Lawham*, 7 Oreg. 422; *Kruse v. Prindle*, 8 Oreg. 158; *Bish. Cont.* § 165. But the two contracts in question here are not between the same parties, nor concerning the same subject-matter. The one is an executory contract, made by a corporation in its corporate capacity, for the sale to defendants of certain franchises then held and owned by it, and containing a stipulation on its part to secure and transfer to them additional rights of way over certain other designated portions of the route of the proposed motor-line; and the other is an executed contract of sale of the stock of the corporation, made by plaintiff and associates as natural persons, and acting in their individual capacity. The two contracts are therefore entirely separate and distinct, between different parties, and concerning a different subject-matter. In one a corporation is a party, in the other, private individuals. By the one, the corporation agrees to sell and transfer to defendants certain property belonging to it, while by the other the defendants purchased of plaintiff and associates certain property belonging to them as individuals; and while it may be true that plaintiff and his associates were the stockholders, directors, and officers of the corporation at the time the contract of April 5, 1890, was entered into, yet they did not assume any personal responsibility in that contract, or become obligated as individuals to procure these rights of way. Nor does the fact that the consideration paid by defendants for the stock was the same in amount as agreed by them to be paid for the franchises of the corporation in any way change or affect the liabilities or obligations of the parties, as contained in the written contracts. Defendants, in place of requiring the corporation to comply with its contract to procure and transfer to them the stipulated rights of way, saw proper, by the consent of the corporation, to purchase and become the owners of all the stock, thereby obtaining control of the corporation and its property, with all its liabilities and obligations, among which was the agreement to procure and transfer the rights of way for the motor-line, which was just as binding on the corporation after as before defendants became the owners of the stock. We think, therefore, the court below was clearly right in holding that the two contracts were not to be construed as one con-

tract, and in instructing the jury that, under the contract sued on, plaintiff was under no obligation to procure or furnish the rights of way in question, or answer for the default of the corporation, if any occurred in so doing.

2. It is also claimed by counsel for defendants that the loss sustained by plaintiff, if any, and sought to be recovered in this action as damages, arose, not directly from the breach by defendants of their contract of May 12, 1890, but indirectly out of the failure of the plaintiff to fulfil his contract with Lambert for the purchase of the land, which he claims to be collateral to the contract sued on, and that such damages are too uncertain, remote, and speculative to be recovered in this action. This question is presented by a demurrer to the complaint, exceptions to the admission in evidence of plaintiff's contract with Lambert, and to the giving and refusal of certain instructions by the trial court, which we shall not undertake to notice in detail, but for convenience shall consider together.

Breach of contract—Measure of damages.

The difficulty in the determination of the question thus presented, and in like cases, lies, not so much in the ascertainment of the law of the subject, as in its application to the facts of the particular case. The broad, general rule in such cases, as we gather it from the authorities, is that the plaintiff may recover such damages, including gains prevented as well as losses sustained, as may reasonably be supposed to have been within the contemplation of both parties at the time of the making of the contract, as the proximate and natural consequences of a breach by defendants; and in determining what may reasonably be supposed to have been within the contemplation of the parties, as the natural consequences of a breach, all the facts surrounding the execution of the contract known to both parties may be considered, even if these be such as would not necessarily enter into it, if unknown to the defendant. It is on this principle that an injured party is allowed to charge the other with loss on collateral contracts, on proving notice, which, in the absence of such notice, would not be considered within the contemplation of the parties. 1 Suth. Dam. 79; 1 Sedg. Dam. § 149; *Hadley v. Baxendale*, 9 Exch. 341; *Hammond v. Bussey*, 57 Law J. Q. B. 58; *Griffin v. Colver*, 16 N. Y. 489; *Booth v. Mill Co.*, 60 N. Y. 487; *Hammer v. Schoenfelder*, 47 Wis. 455; *Messmore v. Lead Co.*, 40 N. Y. 422. These and other authorities on this question are carefully collated and discussed in 1 Sedg. Dam. § 144 *et seq.*, and in 5 Amer. & Eng. Ency. Law, tit. "Damages," and we shall therefore attempt no review of them, but shall only refer to the admirable statement of the

rule by Mr. Justice SELDEN in *Griffin v. Colver*, *supra*, "that the injured party is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

Now, in the case at bar, the damages sustained by plaintiff, and sought to be recovered, if any, are, it seems to us, in view of the known facts surrounding the execution of the contract, such as may reasonably be supposed to have been within the contemplation of the parties at the time the contract was executed, as the proximate and natural consequences of a breach by defendants, and may be recovered in this action. From the terms of the contract itself, as well as from all prior negotiations between the parties, it clearly appears that the defendants must have known at the time they purchased plaintiff's stock in the corporation, and agreed to build the road by a stipulated time, that the object to be accomplished by the building of the road, so far as plaintiff was concerned, was to enhance the value of the Lambert land so that he might derive some profit therefrom. The proposition of defendants made to the Portland, Sellwood & Milwaukee Railway Company, of which plaintiff was the president and sole stockholder, on April 4, 1890, to purchase the rights and franchises of the company, and in which they proposed to build the road by October 31, 1890, on its face, shows that the Lambert land was to be specially benefited by the proposed road; for the franchises were to be transferred without restrictions as to charges over the motor-line, except as to residents and property-owners on such land, which was to be limited to 20 tickets for \$1. These same special privileges as to the Lambert land were carried through all subsequent negotiations and contracts between the parties, and clearly indicate that the sole object plaintiff had in view in making the contract was to enhance the value of such land; and defendants must have known that the natural and probable result of a failure on their part to build the road would be to prevent such enhanced value.

The complaint alleges, and the evidence tends to prove, both from the contract itself and the circumstances surrounding its execution, that defendants knew at the time they made the contract to build the road that plaintiff either owned or had some interest in the Lambert land, and that his object in securing the franchises and commencing to build the pro-

posed road was to enhance the value of such land, and derive a profit therefrom; and under such circumstances, and with knowledge of the object and purpose of the proposed road, defendants agreed and contracted with plaintiff and his associates to purchase their stock in the company holding such franchises, and build the road, within a stipulated time, to such land, and have failed to do so, in consequence of which plaintiff was unable to complete his contract for the purchase of the land, but was compelled to cancel it, and was thereby prevented from realizing the profits or gains which would have accrued to him had the contract been performed. Under such circumstances the loss of such profits or gains may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made, as the reasonable and probable consequences of the breach, because they must be taken to have known these consequences. As the gains prevented or losses sustained by plaintiff by the failure of defendants to build the proposed road are represented by the profits which he would have received if such road had been built, and he enabled to keep his contract with Lambert for the purchase of the land, defendants are responsible for such losses, if they are chargeable with notice. As MASON, J., said in *Messmore v. Lead Co.*, *supra*, "it affirms nothing more than that, where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed." Nor does the fact that plaintiff surrendered and cancelled his contract for the purchase of the land after the franchises under which defendants proposed to build the road had been revoked by the city of East Portland prevent him from maintaining this action.

If, after it became apparent that defendants would and could not build the road according to their contract, and on account thereof plaintiff found himself unable to comply with his contract with Lambert, and purchase the land, he had a right, in order to save himself from greater loss, to make such terms with Lambert for the cancellation of the contract as he could, and then bring this action against defendants to recover such damages as he may have sustained by reason of the failure on their part; and this brings us to the measure of damages in this case. The court below held, and so instructed the jury, that the damages claimed in this case are damages connected with the land, and accrued to whoever may have owned the land at the time the contract of defendants should have been fulfilled, and that since Lambert, who was the owner of the land at that time, had assigned to plain-

tiff his right of action for a breach of defendants' contract, he could maintain the action, and recover whatever damages may have accrued to the land, and on this theory instructed the jury that the measure of damages is the difference between the value of the land on October 31, 1890, with the road built and in operation, and its value without the road. In this, we think, there was error, both in holding that plaintiff could in this action recover any damages which may have accrued to Lambert, and in giving the rule for the measure of the damages. This action is not brought to recover Lambert's damages, if any, nor does the complaint aver that he was in any way injured by defendants' breach of their contract to build the road, but it is prosecuted to recover the gains prevented or losses sustained by plaintiff; and the evidence and measure of damages would materially differ in the two cases, assuming, but without deciding, that Lambert ever had a cause of action for a breach of defendants' contract. Lambert did not in fact own the stock which he assigned to defendants, but held it in trust for plaintiff; and when he executed the contract of May 12, 1890, he was acting for and in behalf of plaintiff; and the assignment of his right of action for a breach of this contract only operated to transfer to plaintiff that which in fact already belonged to him, and enabled him to maintain this action unembarrassed by any apparently outstanding right of action in Lambert or the other parties to the assignment; and for this purpose it was competent evidence.

But this action is maintained in plaintiff's own right, to recover such damages as he may have sustained; and the effect upon the value of the land, of defendants' failure to build the road, is only material as it affects the measure of damages and the amount he is entitled to recover. The rule for the measure of damages, as stated by the trial court, is erroneous, as applied to the facts of this case, because it fails to take into account the fact that plaintiff had agreed to pay for the land a stipulated sum, which, so far as he was concerned, fixed its minimum value; and his loss, if the land was not actually worth what he agreed to pay for it,—and there was evidence to that effect,—could certainly only be the difference between the price he was to pay under his contract and what its value would have been on October 31, 1890, with the road built and in operation. The prejudicial effect on the rule adopted by the trial court is apparent when it is considered that plaintiff was to pay for the land \$588.23 an acre under his contract with Lambert, and he himself testified that the land was not worth, at the time he contracted for its purchase, to exceed \$500 an acre, without a motor-line or the

prospect of one. So that the difference between its value, according to his testimony, without a road, and what he agreed to pay for it, was within about \$2500 of the verdict in this case. The true rule for the measure of damages for a breach of the contract sued on, as applied to the facts of this case, in our opinion, is the difference in the value of the Lambert land on the 31st day of October, 1890, without the road—not less in amount, however, than the price plaintiff agreed to pay for it,—and what its value would have been on that day, with the road completed and in operation. This appreciation in the value of the land, if any, was, it seems to us, clearly within the legal, if not the actual, contemplation of the parties, at the time the contract was made; and the loss of this increased value is the proximate and natural consequences of defendants' breach, and is the fairest and closest approximation of the actual pecuniary loss sustained by plaintiff which the law is capable of furnishing. This view as to the measure of plaintiff's damages seems to be fully supported by the adjudged cases. *Railway Co. v. Gilmer*, 85 Ala. 422; *Railway Co. v. Sumner*, 106 Ind. 55, 24 Am. & Eng. R. Cas. 641; *Watterson v. Railway Co.*, 74 Pa. St. 208; *Wilson v. Railway Co.*, L. R. 9 Ch. App. 279; *Bronson v. Coffin*, 108 Mass. 175; *Railway Co. v. Molloy*, 64 Tex. 607, 25 Am. & Eng. R. Cas. 244.

As defendants failed and neglected to build the road within the stipulated time, or at all, it may be difficult for plaintiff to prove with exactness what would have been the value of the land with the contract fulfilled, but such uncertainty does not prevent him from recovering such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit, bearing upon the matter of his damages, and legally tending to prove such value. *O'Brien v. Society*, 117 N. Y. 310; *Ice Co. v. Heinze* (Mo. Sup.), 14 S. W. Rep. 756. Where one violates and entirely repudiates his contract with another, the damages sustained by the injured party are, as EARL, J., said, "nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjecture and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof; and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not

be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain." *Wake-man v. Manufacturing Co.*, 101 N. Y. 209. The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount. Now, in this case, it is certain, under the facts as he claims them to be, that plaintiff has sustained some loss as the proximate and natural consequences of the breach of defendants; and under such circumstances the law will adopt that mode of estimating the damages which is most certain and definite, and it seems to us the rule we have suggested most nearly meets the requirements of the law.

3. It is also claimed that the trial court erred in the admission of certain opinion evidence as to what the value of the Lambert place would have been on October 31, 1890, if

Opinion evi-
dence as to
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damages.

defendants had complied with their contract, and built the motor-line as they agreed to do. A number of the witnesses were called by plaintiff, who were qualified to speak from business experience, from familiarity with the value of real estate in and about Portland, and the effect upon such values of the construction and operation of suburban motor-lines, as well as from a knowledge and familiarity with the situation, location, character, and quality of the Lambert place, and were permitted by the trial court, against defendant's objection and exception, to give their opinions as to what that place would have been worth on October 31, 1890, had defendants fulfilled their contract, and constructed the motor-line in accordance with their agreement. Two objections are urged to the competency of this testimony: *First*, that the fact sought to be proved is so remote and speculative as not to be a proper item of damages in this case; and, *second*, it is not a matter upon which opinion or expert testimony is admissible. In the view we have taken as to the proper measure of damages in this case, as already indicated, it is only necessary for us to consider the last objection stated.

It is undoubtedly true, as a general rule, that a witness is only permitted to testify as to facts within his own knowledge, and not to inferences or opinions. But to this rule there are certain exceptions; and one of these exceptions is that when the value of real estate, which is always largely a matter of

opinion, is in controversy, persons who are acquainted with the property in question, and know the value of real estate in the same neighborhood, are competent to give their opinion as to its value. "These opinions are admissible," says GRAY, J., "not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved." *Swan v. Middlesex*, 101 Mass. 177. Indeed, the courts are practically unanimous in following this rule. Rog. Exp. Test. § 155; *Lawson, Exp. Ev.* 435; 3 Sedg. Dam. § 1294; 1 Suth. Dam. 786, 789; 1 Rice, Ev. 335. Nor do we understand that counsel for defendants seriously controverts the rule as above stated; but he contends that such evidence must be confined to the present or past value of the land, and not to its value under other and wholly different circumstances, and in support of his contention relies upon a series of New York cases, all of which are founded on *Roberts v. Railroad Co.*, 128 N. Y. 455, which was an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in the street in front of his property. The trial court allowed and permitted a witness who was familiar with the plaintiff's property, and its value, to testify as to what, in his opinion, the property was damaged by the presence of the structure and operation of the road, and as to what it would be worth without the road; but on an appeal the evidence was held to be incompetent and inadmissible, but by a divided court. The majority opinion is based entirely on the previous decisions in that state; and, after a careful and exhaustive review and examination of them, Mr. Justice PECKHAM, speaking for the majority of the court, concluded, under the rule of that state, that while a competent witness might give his opinion as to the present or past value of real estate, because it is founded on facts that now exist or once existed, he could not testify as to its value under other or wholly different circumstances, because such evidence is uncertain and speculative, and would invade the province of the court or jury, whose duty alone it is to determine the amount of damages. Mr. Justice GRAY, in an able and learned dissenting opinion, in which Chief Justice RUGER concurred, maintained that the evidence was competent, both on principle and the authorities of that state; and while the opinion of the majority of the court is in harmony with the former adjudications of New York, yet, as an original question, we are inclined to think the better reason, as well as

weight of authority from other states, is with the majority opinion.

This question has never been finally adjudicated in this state, although we understand the practice at the various circuits has been to admit such evidence; and we are therefore for the first time confronted with the question as to whether, in cases where the amount of recovery depends upon the difference in the value of land in its present condition and what it would be worth under different circumstances, such as the location of a railroad, street, or public highway over it, the opinion of witnesses qualified to speak upon the subject is admissible in evidence as to what the land would be worth in its changed condition. It seems manifest that such evidence, from a well-informed and intelligent witness, would materially aid and assist the jury in arriving at a just conclusion, and without its assistance the verdict would ordinarily be the merest speculation. The situation, location, and character of the land, and of the proposed improvement or burden, may be accurately and minutely described, and yet the jury be wholly unable, from such evidence alone, to form an intelligent opinion as to the probable effect upon the value of the land of such proposed improvement or burden. As was said by ELLIOTT, J.: "Of what assistance to a jury composed of clergymen, merchants, and bankers would be a description of the minutest accuracy, without some estimate of value by a competent witness? Possibly, it would enable such jury to form a crude conjecture. It would do but little more." *Yost v. Conroy*, 92 Ind. 467. And in the language of SKINNER, J., in *Railroad Co. v. Von Horn*, 18 Ill. 259, "to describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages, and disadvantages, and demand of them, upon this information alone, a verdict as to its value, would be merely farcical; and this, indeed, is all that can be done to enable them to arrive at a conclusion as to the value, unless the witnesses are allowed to state their judgment or opinion, together with the facts upon which such opinion is founded." If, as the authorities all agree, skilled evidence is admissible to prove the value of land in its present condition, why should it be deemed inadmissible to prove its value under different circumstances? In the one case it is competent on the ground of obvious necessity, and because no more definite knowledge is to be had; and for the same reason, it seems to us, it should be admitted in the other.

It is suggested that such evidence is speculative and unreliable, but the same objection can be urged with equal force, to the admission of expert or skilled evidence in any case;

and, if we hold this evidence incompetent on that account, it seems to us we would be shutting the door against the admission of opinion evidence in all classes of cases; for, if the objection is valid in the one instance, so it is in all. The jury are not bound to take such evidence as true, but must exercise their own judgment in determining from it and all the other facts in evidence before them what the real merits of the case are. They are only required to give it such weight and effect as they may think it deserves, in view of all the facts and circumstances of the case. The witness may and should be required to detail to the jury, so far as possible, the facts and circumstances upon which his opinion is founded, so they may judge of its value as evidence; and from these and all the other evidences in the case, together with the opinion of the witness, if they think it deserving of any weight, their verdict should be formed.

It is also claimed that such evidence invades the province of the jury, where the amount of damages depends entirely, as in the case at bar, upon the question of value. But this question is not directly presented by this record, for the evidence admitted was not the opinions of the witnesses as to the amount of plaintiff's damages, but their opinion as to the probable value of the Lambert place with the motor-line built and in operation on October 31, 1890; and in no case that we have been able to find, except the one from New York, have the opinions of witnesses as to value been excluded because the questions of damages and value were identical. In many of the states, in such case, a witness is not allowed to state his opinion as to the amount of damages, but only as to the value of the land before and after the contemplated improvement or burden, leaving the subtraction to be made by the jury; but Mr. Rogers says the weight of authority as well as reason is in favor of allowing the witness to express his opinion as to the amount of damages, as it is but a mere mathematical calculation. Rog. Exp. Test. 369, where the authorities on both sides are collated. And this seems to be the rule in this state; for in *City of Portland v. Kamm*, 10 Oreg. 383, which was a proceeding to condemn land for a street, this court held (WATSON, C. J., delivering the opinion) that it was competent to ask a witness the following question: "What, in your opinion, is the damage to that portion of the tract of land belonging to defendant, Kamm, which lies within 100 feet of the proposed street, by reason of the laying out of said street?" This case would also seem to recognize the rule that the opinion of a competent witness should not be confined to the past or present value of land, but may be given as to its value under other and different conditions;

for the inquiry of the witness was not as to the present value of the Kamm land, but what would be its condition after the opening of the proposed street.

A careful examination of the books and cases has satisfied us that in a case like the one at bar, where the amount of damages depends upon the value of the land with and without the contemplated improvement, a witness competent to speak upon the subject may state his opinion of the value of the land with and without the proposed improvements. Judge REDFIELD, in speaking of the competency of opinion evidence in similar cases, says: "One may enumerate some of the leading facts upon which such opinion is based; but, after all, the testimony as to facts is excessively meagre, without the opinion of the witness either upon the very subject of inquiry, or some one as near it as can be supposed. Hence, in those courts where the opinion of witnesses in regard to the value of property, real or personal, is not admitted, it leads to sundry shifts and evasions in the course of the examination of witnesses upon that subject, which, while it is not a little embarrassing in itself, at the same time illustrates the inconsistency, not to say absurdity, of the rule." 1 Redf. R. R. 289. And in *Mills on Eminent Domain* (section 165) it is said that "the general rule is that witnesses shall not testify how much the property is damaged, or give their opinion as to the amount of damages. They may testify as to the value of property, and as to the value of property before and after the improvement, but not as to the effect of the change in adding to or taking from such value. The extent of damages is to be proved by facts, and estimated by the jury. Hence a witness cannot be asked the value of the land with the strip taken out. Notwithstanding the array of authorities above cited, there seems to be a growing tendency to allow witnesses to give an opinion on the amount of damages. It can hardly be seen how the jury can with any greater fairness arrive at the amount of damages by subtracting for themselves the present value from the former value than by allowing a witness to do the same thing." Mr. Pierce, in his work on *Railroads* (page 227), says: "Opinions are admissible as to the amount of damages or benefit resulting to an estate from the construction and working of a railroad. The amount may also be calculated by comparing the valuation of the property before and after the taking as made by the witnesses—a method which is relieved by the objection that the amount of the damages is the issue to be found by the jury." In support of the text the author cites cases from most of the states of the Union. In the case of *Yost v. Conroy*, 92 Ind. 464, which was an action to condemn land for a public ditch, it was held, in a well-

considered opinion by Judge ELLIOTT, that the opinion of one acquainted with the land, as to its value with and without the ditch, was proper evidence. So in *Swan v. Middlesex*, 101 Mass. 173, on the question of the injury to an estate by taking part of it to widen a street, it was held competent for a witness to testify as to "what, in his opinion, would be the effect, upon the value of the estate in question, of widening the street and cutting off the land and tree." And in *Snow v. Railroad Co.*, 65 Me. 230, which was a proceeding to condemn land for railway purposes, it was held competent for persons acquainted with the land to state their opinions as to its value, or the amount of damages done, if all the land is not to be taken. The following authorities, in addition to those already cited, are also in point, and may be referred to in connection with this discussion: *Whart. Ev.* § 450; 1 *Rice*, *Ev.* 335; *Hosher v. Railroad Co.*, 60 Mo. 303; *Railroad Co. v. Pugh*, 85 Ind. 279, 10 *Am. & Eng. R. Cas.* 196; *White Deer, etc., Co. v. Sassaman*, 67 Pa. St. 415; *Lehmicke v. Railroad Co.*, 19 Minn. 464 (Gil. 406); *Sexton v. North Bridge-Water*, 116 Mass. 200; *Tucker v. Railroad Co.*, 118 Mass. 546; *Railroad Co. v. Henry*, 79 Ill. 290; *Snyder v. Railroad Co.*, 25 Wis. 60; *Tate v. Railroad Co.*, 64 Mo. 149.

In applying the view we have taken of the law of this case upon a new trial, the other questions suggested at the argument will perhaps be avoided, and therefore need not be considered at this time. Judgment of the court below is reversed, and a new trial ordered.

Street Railways—Franchise of Lessor Passing to Lessee.—In *Reeves v. Continental R. Co.*, 152 Pa. St. 154, where a street-railway was leased for a term of years and operated exclusively by its lessee company, with all the powers of the lessor, except the franchise to be a corporation, and with its own express franchise to make contracts and lease and operate roads, etc., it was held that a city ordinance authorizing the lessor company to construct appliances for an overhead electric system, granted such right to the lessee company, although the ordinance named only the lessor. The court said: "It appears in the answers, and is undisputed, that the Philadelphia Traction Company is the lessee for long terms of years of the three other companies defendant, and that each of them is operated exclusively by its lessee. In each case the two companies, lessor and lessee, are in the exclusive management and operation of the latter, which has all the powers and authority of the lessor, except the sole reserved franchise to be a corporation, and has, in addition, its own express and specific franchise to make contracts, and lease and operate roads, and furnish motive power. In their aspect to the public, as regards their powers and their duties, the two companies are as one, and in the doing of any specific thing, whether it should be done with the right hand or the left is to the public immaterial. What the public interests are concerned with is the thing itself which is to be done, not the technical name of the corporation that is to do it; and when, therefore, the councils gave their consent to the operation of the electric system upon the streets occupied by these railway lines, the presump-

tion is that it was the thing, more than the person, that occupied their attention. The scope of legislative acts, whether statutes or ordinances, is to be determined by the intention of the enacting body, and while that is to be sought in the language employed, yet, if the meaning is clear, it is not rendered ineffective by the use of inapt words. They may make the meaning more difficult to reach, but not the less paramount when ascertained. In the present case the thing to be done was the operation of the railways on the streets named by the overhead electric system, and the corporation by which in fact it was to be done was the traction company. Whether by virtue of its own powers, or by those of its lessor, was of no moment to the public interests; for, as already said, all the powers of both were in the same hands. But the street-railway companies, though they had parted with the present control of all their powers except the reserved franchise to be a corporation, were nevertheless the owners, not only of all the franchises, but of all the plant or property necessary for the use of such franchises. To them, by virtue of their reversionary interest, it would all finally come, upon the termination of the lease, whether by its own limitations, or by surrender, forfeiture, or new contract. There was therefore a legal propriety in naming such company as the grantee of the city's consent that the thing should be done. But whether or not this consideration entered into the matter at all, the circumstances leave no room for doubt that the consent of councils was that the thing should be done by the two corporations acting together as one; and such consent, whether it named one or the other, was meant to be operative as to both. This is the common-sense view of the action and intent of councils, plain to all men. The subject was within their control, and what they meant by the ordinance is the law of this case. To refine it away and defeat its purpose by technicalities would be a misuse of legal principles, which are instruments to ascertain, not to defeat, legislative intent. We are clearly of opinion that the consent of councils, expressed in the ordinances on the subject, was sufficient."

Railway Franchise—Assignment in Escrow—Broken Condition.—In *Atkinson v. Ashville St. R. Co.* (N. Car., Nov. 14, 1893.), 18 S. E. Rep. 254, the plaintiff alleged that, as owner of a franchise to build and operate a street railway, he assigned the franchise in escrow to M to be delivered to D, after the latter had built and operated the railway on the streets named in the charter; that the said M, in violation of the trust reposed in him, delivered the said assignment to D, although the latter had not then begun to build any street railroad, and did not thereafter build any; that the defendant with full knowledge of the facts bought the franchise from D. Plaintiff prayed that the delivery of the assignment by M to D be declared void, and that the plaintiff be declared the owner of the license and franchise to build and operate the said railroad; that the defendant be perpetually enjoined from ever exercising the rights granted by the license, privilege, and franchise. *Held*, that the question whether the franchise had been duly obtained by the plaintiff could not be attacked in the action.

CITY OF POTWIN PLACE

v.

TOPEKA R. CO.

(Kansas Supreme Court, June 10, 1898.)

Street Railways — Duties to Public Enforced by Mandamus. — The performance of the duties which a street-railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by *mandamus*.

Same—Assignee of Franchises Assumes Duties of Assignor. — The city of Potwin Place granted to the T. R. T. Ry. Co. the right to construct a street-railway on certain streets under an ordinance requiring a stated car service to be furnished by that company. Said company thereafter executed and delivered to defendant a deed by its terms granting, assigning, and conveying to the defendant all franchises, powers, privileges, and immunities possessed by it and its line of road in plaintiff city. Defendant accepted said deed, and operated said line for a time. *Held*, that the defendant thereby assumed the performance of the duties toward the public which before rested on the grantor.

Same—Writ of Mandamus Framed for Public Interest. — The granting of a writ of *mandamus* rests largely in the sound discretion of the court, and where it is asked to enforce the performance of a duty to the public the interest of all the people concerned will be regarded, and the writ will be so framed as will best preserve and enforce the rights of all parties.

THE city of Potwin Place, a city of the third class, brings this action against the Topeka Railway Company to compel it to operate its line of street railway in the city of Potwin Place, which it acquired by purchase from the Topeka Rapid Transit Railway Company by deed, dated April 5, 1892. The line in question was constructed by the Topeka Rapid Transit Railway Company under Ordinance No. 25, passed by the mayor and councilmen of the city of Potwin Place on May 10, 1889, by which the last-named company was granted the right to construct and operate a road for a term of 20 years along Willow avenue from the east to the west line of the city, on Elmwood avenue from Laurel avenue south to the city limits, and on Laurel avenue from the east to the west line of the city. The line was constructed, soon after the passage of said ordinance, along Willow and Elmwood avenues, and on Laurel avenue from Elmwood east to Greenwood avenue, and was operated by that company until the execution of the deed before mentioned. By this deed the rapid transit company conveyed to the Topeka company all its lines of road in the city of Topeka, and this line in Potwin Place, which is particularly described in the deed. The defendant soon thereafter pro-

ceeded to operate the line of road located in the plaintiff city in connection with its lines in Topeka, substantially as it had been before operated by the rapid transit company, and continued to so operate it up to about the 27th day of October, 1892, when it ceased to operate its line in Potwin Place, and it has failed to operate it ever since. Since the construction of said road the city of Potwin Place has been enlarged by the addition of what was before termed Auburndale, so that in territorial extent it has been more than doubled and largely increased in population. Said ordinance 25 gave the Topeka Rapid Transit Railway Company the right to construct its track, and operate by electricity its road. It provides that "the cars of said company shall at all times be entitled to the track, and the driver of every other vehicle on the track or by the side thereof shall turn such vehicle out when any car comes up, so as to leave the track unobstructed for the free passage of the cars," and requires that "said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours, and at least once every thirty minutes for four hours, during that part of the day the road shall be operated." On the 2d of May, 1892, the defendant also acquired by deed the property of the Topeka City Railway Company, which was operating horse-car lines in Topeka, one of which extends into Auburndale, and is still operated by horse-power. An alternative writ of *mandamus* was issued in this case on the 21st of November, 1892. The defendant filed a motion to quash, which was overruled at the April session, but no opinion was filed or announced on the legal questions involved. Afterward the defendant answered, and the case was tried on its merits at the May session.

John W. Day, N. H. Loomis, and J. B. Larimer, for plaintiff.

Rossington, Smith & Dallas, for defendant.

ALLEN, J.—Various questions are discussed in the briefs, which it will be unnecessary for us to consider at length, because the defendant company asserts that it desires to operate a line of road through the city of Potwin Place, but it objects to operating the line already constructed, because it claims that a better route could be selected both for the company and for the people of Potwin Place. The defendant claims that it desires, and has asked the passage of, an ordinance which will permit it to operate a line of road on a different route through the old city of Potwin Place through the addition of Auburndale in the direction of the insane asylum, and that it would be will-

Contentions of
counsel.

ing to construct and operate such route on what counsel term "any direct route," but the city and the company have failed to agree on a new line, and the defendant has refused to operate the old one. It is not seriously contended that the old line is unprofitable, but it is claimed that both the interests of the defendant and of the people of Potwin Place, and especially of those living in the western part, known as Auburndale, require that the electric-car service should be extended to the neighborhood of the insane asylum, as the people of Auburndale are now dependent entirely on a horse-car line for street-car facilities. The plaintiff asserts a willingness to grant defendant company a right to construct its line into Auburndale, as desired by the defendant, but insists on the operation of the line already constructed, and that no other route could be selected which would so well accommodate the people of the original city.

Defendant challenges the power of the court to compel it by *mandamus* to operate its road in Potwin Place. Counsel concedes that a railroad corporation can be compelled to perform its charter obligations, but insists that it is not bound by Ordinance No. 25, and that mainly for two reasons: First. That a city ordinance does not confer rights and create obligations which can be enforced by *mandamus* in the same manner as charter obligations can be; second, because it is not a party to the ordinance, and has not assumed the obligations imposed by its terms. Much is said in the briefs on the question whether the privileges granted to and the duties imposed upon the rapid transit company by Ordinance 25 constitute a franchise, a contract, or a mere license; the defendant contending that they amount to but a license.

The term "franchise" seems to be used by the courts with much laxity. In *Morgan v. Louisiana*, 93 U. S. 223, it is said: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with 'rights, privileges, and immunities,' though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges, which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like." In

Franchise and
license com-
pared.

Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 107, 46 Am. & Eng. R. Cas. 169, it is said: "The right to operate the railway in the streets is a franchise obtained through power given to the city by the state, but the state reserved the power to regulate such franchise and impose conditions upon it." In *Railway Co. v. Nave*, 38 Kan. 744, 36 Am. & Eng. R. Cas. 29, it was held: "Where a city authorizes a street-railway company to occupy a certain street and construct a railroad thereon at any time within six months after the authority is granted, the privilege so given must be used, if at all, before the expiration of the time limited," and that the permission so conferred was until actually availed of by the company, a mere license, which the city could revoke. The question was not presented in that case as to the rights of the parties after the railway company had expended money on the faith of the ordinance in constructing its lines, and had obstructed the street by placing its roadbed and appliances for operating the same thereon.

We think it unnecessary in this case to nicely discuss the use of words. The substantial question we have to decide is whether a duty which the law enjoins rests on the defendant, as a corporation, to operate its road. That corporations may be compelled by *mandamus* to perform their duties to the public is now well settled. *Merrill, Mand.* §§ 157-159; *Railway Company Co. v. Hall*, 91 U. S. 343; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *Hauger v. Water Co. (Oreg.)*, 28 Pac. Rep. 244; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 20 Am. & Eng. R. Cas. 45; *Smalley v. Yates*, 36 Kan. 519, 22 Am. & Eng. Corp. Cas. 187.

By the provisions of the ordinance, the rapid transit company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electrical power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel—that they might enjoy the benefits of one of the inventions of the age. By the terms of the ordinance the rights of the company were defined, and their duties to the public declared. The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its term? May it still incumber the streets of the city with its track, poles, wires, etc., and refuse to operate its road? It is said that the performance of only charter

Provisions of
the ordinance.

obligations can be compelled by *mandamus*—that the charter of the defendant company does not require it to operate a line of railway in the city of Potwin Place. The obligations imposed on a railroad company are seldom defined with any degree of particularity by the terms of its charter, and this is especially true of street railways, and in this state, where all corporations are formed under general laws. It is true that the company gets its charter under the general law of the state, but the rights conferred by the charter of a street-railway company incorporated for the purpose of operating a street railroad in the city of Topeka is but a barren grant until it is given form and force by an ordinance of the city permitting it to enter on the streets and construct and operate its lines. From the state directly it derives but the bare power to exist. Its vital force comes from the state indeed, but through the subordinate agency of the city council, which is given power by the legislature to fix the terms and conditions on which it may actually carry out the purposes of its creation.

Now, while it is true that both the rapid-transit railway company and the defendant, having obtained charters from the state, and also ordinances from the mayor and council of the city of Topeka, granting them the privilege of operating within the city of Topeka, Duty of assignee to public. were in a position to carry out some of the purposes of their organization, and might be said to have an active existence, they were still, so far as their operations in the city of Potwin Place were concerned, wholly without power. In no way whatever could they obtain the right to operate a railway within the limits of Potwin Place except by authority of the mayor and council of the city. Having accepted the rights and privileges conferred by the ordinance, we think the duty rests on them, in favor of the plaintiff city and its citizens, to render them the service for which the privilege was granted. While there may be some doubt as to whether this ordinance granted the rapid-transit company a franchise within the strict definition of the word, it is extremely difficult to perceive wherein the rights conferred substantially differ from a franchise derived immediately from the legislature. It is certainly a grant in the nature of a franchise, and one which imposes on the company duties toward the public. A street railway may be compelled by *mandamus* to perform these duties. See Booth, St. Ry. Law, § 65, and authorities there cited. Whether the company's duties be denominated contract obligations, or duties imposed by the terms on which a franchise has been granted, the duties are essentially public, and such that no adequate rem-

edy in the ordinary course of legal proceedings is afforded the plaintiff and its citizens.

As to the second contention, that the defendant company is not bound by the ordinance because it is not a party to it, we

Assignee bound
by ordinance
respecting as-
signor.

think it clear that the rapid-transit railway company had the right to sell its property in Potwin Place. That property would be valueless without the power to operate it. The defendant company

is incorporated for the purpose of operating lines of street railway in Topeka and vicinity. The deed from the rapid-transit company to the defendant by its terms grants and conveys to the defendant "all and singular the rights, franchises, powers, privileges, and immunities possessed by it," and conveys by special description the line on Willow avenue, Elmwood avenue, and Laurel avenue in the plaintiff city. We fail to perceive any valid ground on which the defendant can impeach its own title to this property, or its right to operate it, under Ordinance No. 25. If it takes the property and the privileges conferred by the deed and the ordinance, clearly it must take them subject to the burdens and laden with the responsibilities declared in the ordinance. The defendant stands in neither better nor worse position in relation to the people of Potwin Place than did the rapid-transit company. It is not pretended that its charter is not broad enough to warrant its operating this line of road. On the contrary, it affirms its desire to further extend its lines within the limits of plaintiff city. It is conceded that the granting of a writ of *mandamus* rests somewhat in the discretion of the court. In this particular case it should be issued only in the interest of the public, and to enforce the performance of a public duty by the defendant. The defendant contends that it will be impracticable to operate the entire line as constructed in Potwin Place, and also to operate an extension through Auburndale to the asylum, in a manner satisfactory to the public. We, of course, have no right to direct the plaintiff to grant the defendant company any new privileges, but in enforcing the plaintiff's rights we ought to take into consideration all of the circumstances, and the needs of all its citizens. The portion of the route which the defendant especially objects to operating is the part on Elmwood avenue from Park to Laurel avenue, and the two blocks on Laurel avenue. The two blocks on Laurel avenue extend east from Elmwood avenue, and therefore lie in the opposite direction from the Auburndale addition. In order to operate these two blocks in connection with an extension through Auburndale toward the asylum it would be necessary either to double the distance on Laurel avenue each trip, or to alter-

nate cars on each route. The evidence leaves us in doubt as to whether this could be done in a manner satisfactory to the people, and, as we are unwilling to make any order which is likely to prevent adequate service being rendered to the people of the Auburndale addition, we think, in the exercise of our discretion, we should not peremptorily require the operation of the two blocks on Laurel avenue.

It appears that the present terminus of the defendant's operated electric line is at the corner of Sixth and West streets; that the company has the right, under the ordinance passed by the mayor and council of the city of Topeka, to construct on any of the streets of Topeka. It is therefore entirely practicable for it to connect its lines now in operation with the east end of the Willow avenue line, and we think it should be required to operate the Willow avenue and Elmwood avenue lines in accordance with the terms of the ordinance.

A peremptory writ will be awarded requiring the defendant to operate its line along Willow avenue, and on Elmwood avenue, from the south end thereof to Laurel avenue, and judgment will be rendered against the defendant for costs. All the justices concurring.

CANAL & CLAIBORNE R. Co.

v.

ST. CHARLES STREET R. Co.

(44 Louisiana Ann. 1096.)

Street Railway Companies—Contract for Double Use of Track—Reorganization—Assignment of Rights.—Two corporations organized under the general laws of the state, each holding assignable street-railway franchises, entered into a contract (each acting for itself, its successors, and assigns) by which the first agreed to pay to the second, as a consideration for authorizing it to run its cars over its track, four cents per mile for each and every mile travelled by each and every car run over its tracks, said agreement to last during the term of the charters granted to the said respective corporations, or of any extension of said charters; provided that, in case the first company shall cease to use the privileges granted to it in the contract, then and in that case the agreement shall be ended. *Held*: (1) That where the first company is in undisturbed possession of the right, exercising and enjoying it every day, it cannot release itself from its contract obligations on the claim that the agreement was *ultra vires* of the powers of its officers. If there be any legal objections to the contract, they must be set up under other conditions, and in a different manner. (2) Where, under such a contract, the second company conveys all its rights, property, and franchises,

specially including therein its rights under the agreement mentioned, to a third company, which assumes all the obligations of the former under the agreement, there is nothing in the assignment of which the first company can complain. (3) The said third company having been organized by the stockholders of the second company, and for the express purpose of acquiring all the rights, property, and franchises of the old company, and assuming all its obligations, and the old company having postponed its dissolution until after such transfer and *assumpsit* should have been made, the new company, for the purpose of the contract declared on in this case, was merely the old company reorganized under a new name. (4) The city of New Orleans has at all times recognized the right of the said second company to remuneration for the use of its tracks by other companies, and the right of the companies, *inter se*, to fix the value of that right, and the dealings between the city and the said first company have all been subordinated to that right, and by way of affirmance, not destruction, thereof.

APPEAL from Orleans district court.

Harry H. Hall, for appellant.

J. R. Beckwith, for appellee.

NICHOLS, C.J.—Plaintiff's petition is to the effect that on and before the 26th July, 1870, the Canal & Claiborne Streets Railroad Company, a Louisiana corporation, was the owner of a street railway on Canal street, in the city of New Orleans, with full right to have, maintain, and operate the same, granted to and confirmed to said company by the city of New Orleans. That the defendant at that time was in possession of a grant or right to maintain and operate a street railway on other streets, particularly on St. Charles, Carondelet, Dryades, Rampart, and other streets, and claims to have and possess such right down to the present time under divers grants from the city of New Orleans, and has continuously operated the same. That on the 26th July, 1870, the defendant, desiring to connect its several lines of railway or the service on its various lines on different streets, made application to the Canal & Claiborne Streets Railroad Company for permission to use or employ a portion of the railway track of that company on Canal street for that purpose, so that defendant's track, connected with said tracks on Canal street by proper connections, would enable defendant to run its cars from its lines on the various streets over its system of tracks above Canal street, passing up one line and down another of its lines—a matter of great convenience and economy to defendant. That to accomplish that object the defendant entered into a negotiation with the owner of said track on Canal street, resulting in the execution of a notarial act of agreement between the said two railroad companies. That in said contract the defendant, for itself, its successors, and assigns, entered into an obligation with the Canal & Claiborne Streets Railroad Company, and its successors and as-

Case stated—
Petition.

signs, to pay four cents per mile for each and every mile travelled, for each and every car run by the defendant on said track on Canal street, from Rampart to St. Charles streets. That it was stipulated and agreed that the contract should continue and be in force and effect during the term of the charter granted to said respective companies, and for and during any extension thereof, and while the defendant continued to run its cars on said track on Canal street. That, as soon as said contract was entered into, defendant commenced running its cars on said track, and made payments up to the month of June, 1887, but from that date has refused to pay any sum whatever for the use of said track, and, although still running its cars over the same, has refused to pay therefor, and has in all respects made default on said contract. That there is due to the plaintiff under the contract the sum of \$60 for each and every one of the months that elapsed from the end of June, 1887, up to the end of April, 1890, soon after which time the present suit was instituted. That on the 8th of May, 1887, the grant of franchise to construct and operate its street railway, before that time vested in the Canal & Claiborne Streets Railroad Company, expired by limitation, but the said company still owned the tracks, roadway, and structure of said railway, the city of New Orleans never having acquired the same by purchase or payment of the appraised value thereof; but on the 13th December, 1877, the city of New Orleans, for a valuable consideration, again granted the said company further right to have and operate its said street railways for the additional term of 25 years, said term commencing to run from the date of the expiration of the former grant (8th May, 1887). So that the two grants make a continuous right, without interval. That, after said grant had vested in and become the property of the said corporation, it sold and transferred to the plaintiff corporation, the Canal & Claiborne Railroad Company, all of its right, title, and interest in and to said franchise, railway, and all of its property and assets whatsoever, and all demands under and by virtue of said contract with the defendant, and thereby the plaintiff became entitled to enforce the same. That the defendant has no right to run its cars over the track of the plaintiff except under and by the terms of said contract, and by reason thereof, and that in the premises it has become indebted to plaintiff in the sum of \$2040 up to the end of April, 1890; for which sum, with interest from judicial demand, it prayed judgment, reserving its right of action for all sums of money that may become due under said contract after the end of April, 1890.

The defendant's answer admits the contract of 26th July,

1870, but avers that said contract, in so far as it purported to impose for an indefinite time upon it the obligation of paying the excessive charges as therein set out, was beyond the power of defendant's officers, and *ultra vires*. It admits that if it be liable, as set out in plaintiff's petition, the amount stated, of \$2040, is a correct statement, of the same; but it denies that defendant is so liable. It avers that prior to the 26th July, 1870, Louis Surgi, city surveyor, under instructions of the council of New Orleans, prepared a plan for a trunk railroad for the line of street-cars on Canal street. That the line of plaintiff, for the use of which it sues the defendant herein, was a part of said trunk railroad, as designated by said plan. That, in the contracts for right of way made between the city of New Orleans and plaintiff, it was expressly stipulated that said line of plaintiff's road should be used for trunk-lines by the various street railroads running on Canal street, upon payment by the railroad companies so using plaintiff's line of a just and reasonable compensation therefor. That under its police power the city had unqualified right to compel defendant to use said trunk-lines, and did so compel it. That therefore the stipulation in said contract for four cents per mile for each car, in so far as it exceeds defendant's proportionate part of the construction and operation of said road, was without consideration. That on the 11th April, 1881, by virtue of ordinance 6971 (A. S.), the city of New Orleans granted defendant a new franchise and right to pass over said line on Canal street. That in 1888 the charter of the Canal & Claiborne Streets Railroad Company expired, thereby putting an end to said contract. That on the 22d July, 1887, defendant notified plaintiff that it would no longer pay four cents per mile, provided in said contract, but expressed its readiness to pay a fair proportion of the cost of construction and operation of said line, in maintaining the same; and that it is liable for no more. It prays that plaintiff's demand be rejected, and that defendant be condemned to pay only such just and proportionate part of the cost of construction and maintenance of said road as might be determined by the court.

This court had occasion recently, in the matter of Canal & C. R. Co. (the plaintiff herein) v. Orleans R. Co., reported in 44 La. Ann. 55, to examine and pass upon a contract between those parties, which, save in a few unimportant particulars, is identical with that declared upon in this suit. Under such circumstances, it would be naturally expected that the construction placed upon that contract would be adopted for the present one; but the defendant most strenuously urges that in the former case the distinction between the charter of a

Contract for
combined use
of track.

corporation and the franchises acquired by it after organization was not sufficiently sharply drawn, nor the point sufficiently pressed that when the Canal & Claiborne Streets Railroad Company went, as it did, into liquidation, on the 2d day of July, 1888, the contract between the parties of July 26, 1870, terminated, under its express terms. The positions taken by the present defendant were taken in the first case, and evidently considered by the court; but as original propositions submitted to us, we hold them to be not tenable. When the contracting parties to the contract of 26th July, 1870, met, they met to deal with an assignable, transmissible right. Each of the parties was expressly contracting for itself, its successors and assigns. Neither corporation owed its origin to a charter granted to it, but each was created by notarial act, under the authority of a general law for the formation of corporations. The defendant was anxious to acquire the right to run its cars over the track owned and operated by the Canal & Claiborne Streets Railroad Company. That company was willing to grant the right, and to bind itself, its successors and its assigns, that it should be held to the defendant so long as it should think proper to avail itself of the same. The minds of both united, not only on that point, but also as to the value of the right so conveyed and acquired. The contracting parties, as they had the legal right to do, as between themselves, settled the consideration to be paid. The defendant entered at once upon the enjoyment of the right, which it has ever since possessed and exercised undisturbed. The plaintiff company, which is the present owner, of the track on Canal street, is not only bound by law to acknowledge and maintain the right of the defendant, but its action in bringing this suit would estop it from contesting it. The city of New Orleans, in whom, according to defendant, is vested control over the whole matter, under its inherent police powers, and under a reservation in its contract with the Canal & Claiborne Streets Railroad Company, has not only not manifested a disposition to interfere with the rights of these parties, *inter se*, but everything it has done since has been by way of affirmation, not destruction. The city has at all times recognized the right of the plaintiff company to remuneration for the use of its road. It stands perfectly indifferent as to what the amount of the same might be, and has never assumed the right, or put forward a claim, to determine that matter where the companies have between themselves agreed upon what a fair valuation was. We see no ground upon which defendant can be relieved from carrying out the contract which it has made. In the actual, undisturbed possession of the right conveyed by the contract,—exercising it every day,—it is diffi-

cult to see how the defendant can plead that the contract was *ultra vires*. Besides this, the contract was not for an indefinite time. Its duration was expressly provided for. If there be any legal objection to the contract, it must be set up under other conditions or in other manner than it has been here.

The views we have expressed cover the whole ground, we think, of the controversy in this case; but as the defendant places special reliance upon the fact already alluded to, that

the Canal & Claiborne Streets Railroad Company went into liquidation and was dissolved on the 2d day of July, 1888, and claims that fact terminated the contract of 26th July, 1870, we think it right to make a special reference to that contention, and

to say that in our opinion, for the purposes of this contract, the Canal & Claiborne Railroad Company is nothing more than the Canal & Claiborne Streets Railroad Company reorganized under a new name. The former company has acquired all the property, rights, and franchises of the latter, and has assumed all its obligations. The avowed purpose of the old company in going into liquidation was to turn over all its assets and rights, and also all its obligations, to the new one; and its dissolution was intentionally postponed to a period subsequent to the accomplishment of that object. The avowed purpose of the creation of the new company was to acquire those rights and that property, and to assume those obligations. The members of the Canal & Claiborne Railroad Company were the stockholders of the Canal & Claiborne Streets Railroad Company. There is no claim or pretension that the defendant has suffered or will suffer, financially or otherwise, by the change; and it would be subordinating substance to technicality were we to hold that defendant has been released from its contract obligations by reason of it. We say this upon the assumption that the continued existence of the old company entered as a factor in determining the rights of the parties in this case. See *Day v. Worcester, etc., R. Co.* (Mass.), 23 N. E. Rep. 824; *John Hancock Mut. Life Ins. Co. v. Same*, 149 Mass. 214, 39 Am. & Eng. R. Cas. 227; *India Mut. Ins. Co. v. Same* (Mass.), 25 N. E. Rep. 975.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the lower court be, and the same is hereby, affirmed.

Double Use of Street Railway Tracks.—See *Union Depot R. Co. v. Southern R. Co.* (Mo.), 50 Am. & Eng. R. Cas. 355; *Canal & C. R. Co. v. Crescen. C. R. Co.* (La.), 50 *Id.* 374; *Canal & C. R. Co. v. Orleans R. Co.* (La.), 50 *Id.* 369; *Pacific R. Co. v. Wade* (Cal.), *Id.* 362; *North Balt. P. R. Co. v. North Av. R. Co.* (Md.), 408; *St. Louis R. Co. v. Southern R. Co.* (Mo.), 46 Am. & Eng. R. Cas. 1; note, 46 *Id.* 25.

STANLEY *et ux.*

v.

UNION DEPOT R. Co. *et al.*

(*Missouri Supreme Court, Div. 2, March 14, 1898.*)

Negligence of Street Railway Company.—Child on Track.—Care Required.—The rule in Missouri requires of a railway company such care with regard to a child attempting to cross its tracks as persons of ordinary prudence would exercise in the same situation, and an instruction to the jury which indicated that something more than ordinary care was required in such a case was properly refused.

Liability of City for Injury Caused by Construction Company.—In an action against a street-railway company for the death of a child, it was not claimed that the city had any active agency in causing the accident further than giving the construction company a contract to build a sewer, and its ordinances required the construction company to so place the excavated material as not to interfere with travel on the street or incommode occupants of adjoining property, and to observe all ordinances in relation to obstructing streets, etc. *Held*, that, if the city were liable at all, it was for negligence in permitting the construction company to violate its own ordinances by creating and maintaining a nuisance.

Injury on Street Railway.—Negligence of Sewer Construction Company.—A construction company, under a contract with a city to build a sewer, made a temporary wall of pavement blocks, which had been torn from the street, leaving an aperture through which people might pass upon a foot-path five feet wide, along a street railway. Travellers had been accustomed to use this pathway and did not usually cross the street railway at this point. It seemed that the construction company had left the aperture in the wall for the purpose of accommodating travellers, and to avoid obstructing the street. A child in attempting to cross the railroad, after having passed through the said aperture, was killed by a passing car. *Held*, that the construction company was not a joint tort-feasor with the railroad company, because it could not logically or reasonably be maintained that there was any necessary connection between the death of the child and the construction of the sewer.

APPEAL from St. Louis circuit court.

This is an action of E. B. Stanley and wife for damages for killing their minor son, Edward W. Stanley, on 25 June, 1890. The petition alleges that plaintiffs are husband and wife; that Edward W. was the minor son, about seven years old; that each of the defendants are corporations organized under the laws of this state, the city of St. Louis being a municipal corporation, and the Union Depot Railroad Company and the Heman Construction Company business corporations; that Twelfth street was, prior to the 25th of June, 1890, one of the public highways of the city of St. Louis; that on an prior to said date the Union Depot Railroad Company owned and

operated a street railroad along Twelfth street, between Spruce street and the Twelfth street bridge, drawn by horses; that prior to said date the Heman Construction Company, with the knowledge of the other defendants, dug a deep ditch in said Twelfth street between Spruce street and the bridge, and negligently, carelessly, and unskillfully piled the granite paving which it dug up out of said street in a large pile and wall many (to wit, five) feet high, parallel with and alongside of said railroad track, and so close as not to afford room for pedestrians to pass along side street between said wall and the passing cars, and negligently made and left open a narrow aperture in said wall, with perpendicular sides as high as the wall, and negligently placed across said ditch a foot-bridge from the sidewalk to the street, and immediately opposite said aperture; that said ditch and wall extended from Spruce street to the bridge, so that persons passing along the west side of Twelfth street were unable to cross said ditch and wall and go onto said bridge in any other way than to cross said foot-bridge and through said aperture, and upon and over said railroad track in front of approaching cars, that Twelfth street sloped in both directions (north and south) to a point immediately and directly opposite to and in front of said aperture, and that said railroad company, with full knowledge of all the facts so stated, negligently, carelessly, and unskillfully ran and operated its cars over and along said street and track in front of said aperture at a rate of speed so great as to endanger the lives and safety of pedestrians who attempted to pass over said foot-bridge between said sidewalk and the roadway of Twelfth street; that such condition of affairs constituted a continuing nuisance, and was dangerous to the lives and safety of pedestrians; that on or about the 25th of June, 1890, the son of plaintiff, who was then seven years of age, while attempting to cross said foot-bridge, and go from said sidewalk to and upon said Twelfth street, "was, through and by the negligence, carelessness, and unskillfulness of the defendant Union Depot Railroad Company, its agents and servants, run upon and knocked down by the horses drawing one of the cars owned and operated by the Union Depot Railroad Company, and was then and there run over by said car, and thereby suffered injuries which caused his death on the next day thereafter, to the damage of the plaintiffs in the sum of five thousand dollars." The city and construction company filed a general denial for answer. The street-car company pleaded a general denial and contributory negligence, which last was, by the court, stricken out.

The evidence developed the following facts: On the 4th of April, 1890, the city of St. Louis passed an ordinance, being

15,640, "to establish Thirteenth street sewer from Poplar street to Market street, to provide for the cost thereof," etc. In pursuance of this ordinance, on May 13, 1890, the city of St. Louis made a contract with the Heman Construction Company, for constructing Thirteenth street sewer on Twelfth street from Poplar street to Clark avenue in the city of St. Louis, Mo. By the terms of this contract it was the duty of the Heman Construction Company to so place excavated material as not to interfere with travel on the street, or to incommode occupants of adjoining property; and to replace paving in the same manner as when originally constructed. Twelfth street, from Poplar street to Clark avenue, is a public highway, and is paved with granite blocks. Twelfth street runs north and south, Poplar street and Clark avenue run east and west. The northern approach of the bridge on Twelfth street which crosses the railroad tracks commences at a point about 50 feet north of Poplar street. The Union Depot Railroad Company had two tracks on Twelfth street from Clark avenue to northern approach of Twelfth street bridge and on the bridge on June 25, 1890; and for a long time prior thereto, was running horse cars on those tracks. The cars going south run on western track and cars going north on eastern track. Some time prior to June 25, 1890, defendant the Heman Construction Company began the construction of a sewer under its said contract with the city of St. Louis, and commenced on Twelfth and Poplar streets, going north on Twelfth street as the work progressed; and on June 25, 1890, the trench for the sewer was dug about 200 feet or more north of the north point of the Twelfth street bridge. The granite paving blocks on Twelfth street along the trench were taken up by the Heman Construction Company, and piled along the east line of the trench about 5 feet high, 3 feet wide, and west of the western rail of street-car track. North of the bridge approach the granite was piled northwardly 9 feet 7 inches in length and 2 feet 2 inches wide to an opening, leaving a space eastwardly between the granite wall and the west rail of track of about from 4 to 5 feet for pedestrians crossing the bridge to walk upon. There was no obstruction between the western car-rail and this pile of granite blocks. On the bridge the distance between the west rail of track and pile of granite blocks was 4 feet, and at the opening it was about 6 feet. At a point 9 feet 7 inches from north approach of bridge, defendant Heman Construction Company left an opening in the pile of granite 7 feet wide, and placed three boards across the ditch, so that persons coming north on the west side of bridge could cross trench to the pavement on Twelfth street, and persons going south on the pavement on west side of Twelfth street could

cross the trench to get to the bridge. North of this opening the granite blocks were piled along the trench 5 feet high, 3 feet wide, and about 2 feet from west rail of track.

There was no street-crossing at this point, nor was the opening in the granite intended to facilitate or invite crossing of the street at this point, but its purpose seems to have been simply to afford a continuous way north and south to and from the Twelfth street bridge on the west side of said street. The street cars were drawn by two horses, but at a point near Spruce street a third horse was hitched to all cars going south, on the west side of the team, in such a position as to occupy, in passing, more or less of the space between the west rail and the wall. It was hitched to the car to help the team draw it, after passing the aperture, up the grade going south, and leading over the Twelfth street bridge. This condition of things had been nearly the same, with the knowledge of the railroad company, since a time late in May or early in June.

On June 25th, Eddie, the seven-year old son of these appellants, in going east across the foot-bridge into the street, was run over by a car drawn by three horses, moving south. The evidence as to the speed of the car was conflicting. One witness for plaintiffs testified the car was going 12 miles an hour. On the part of defendants, two witnesses put it at 4 miles an hour, one at 4 to 5 miles, and one says the horses were moving in a slow trot. No witness for plaintiffs saw the accident. Sahms, who was on the car, says he sat with his face to the rear, or north, and did not see the boy until after the car ran over him. On the part of defendants, William Buckrader, a commercial traveller, and, so far as the record discloses, wholly disinterested, says he was sitting on the front seat of the car next to the driver, and facing south. He, Edward Yeoho, the driver of the hill or extra horse, and William Robinson, the driver of the car, all testify and agree that the little boy came out of the aperture in the granite wall, and ran or stepped immediately in front of the horses between the out-horse and the team. Whether he struck the horse or the horse struck him, neither could say, it was done so quickly; Buckrader saying, "it just was an eyesight" from the time the boy came out of the opening until he ran into the team and was knocked down. That the drivers immediately applied the brakes, and at once checked the horses, is not open to question. The car was halted inside of its length.

The jury returned a verdict in favor of the street-railway company, and against the city and construction company for \$3000. The case is here on cross-appeals, plaintiffs appealing from the verdict in favor of the street-railway company, and

the city and construction company from the verdict against them.

Chas. B. Stark and Walter F. McEntire, for Stanley and others.

G. A. Finkelnburg, for Union Depot Co.

T. J. Rowe, for Heman Construction Co.

W. C. Marshall, for city of St. Louis.

GANTT, P.J.—Considering the appeals separately, that of the plaintiffs presents only one question for determination. They complain of the court's refusal to give, in addition to other instructions in their behalf, the following: "The court instructs you that if you believe from the evidence that there was on June 25, 1890, a ditch and a pile of stones in Twelfth street, and that there was a foot-bridge across said ditch, and an opening in said pile of stones, and that they were so near to the car track owned by the defendant Union Depot Railroad Company as to make the situation especially dangerous to persons crossing said foot-bridge, then it became the duty of the defendant Union Depot Railroad Company and its servants and employes, in running its cars past said place, to exercise an increased care and vigilance corresponding to the increased danger; and if you believe from the evidence that the defendant Union Depot Railroad Company, its servants or employes, had knowledge of such situation, so increasing the danger to persons so using said foot-bridge, or had knowledge of such facts as would put a reasonably prudent man on his guard; and if you further believe from the evidence that the said defendant, its servants or employes, failed to exercise such increased care and vigilance in running its cars at said place, and that because of such failure the son of the plaintiffs was run upon and injured so that he died; or if you believe from the evidence that the son of the plaintiffs would not have been injured if the said defendant, its servants or employes, had exercised the increased care and vigilance corresponding to such increased danger—then, and in either such case, your verdict should be in favor of the plaintiffs, and against the said defendant." The court had already given, at the request of plaintiffs, these two instructions: "(1) If the jury believe from the evidence that the boy, Edward W. Stanley, was the son of plaintiffs, and that the servants of defendant the Union Depot Railroad Company in charge of the team of horses and car which struck said Edward saw, or by the exercise of ordinary care would have seen, said Edward in a position likely to receive injury from said team and car in time, by the exercise of ordinary care, to have avoided injuring said Edward, and

that said Edward was injured as a direct result of the negligence of defendant's said servants in not seeing said Edward in said position of danger in time to have avoided injuring him by exercise of ordinary diligence, or as a direct result in not using ordinary diligence to avoid injuring him after seeing him in said dangerous position, then the jury will find against the defendant the Union Depot Railroad Company. (2) The court instructs the jury that your verdict should be in favor of the plaintiffs, and against the Union Depot Railroad Company, the defendant, if you believe from the evidence that the plaintiffs are the father and mother of the deceased, Edward W. Stanley; that the defendant Union Depot Railroad Company prior to and on June 25, 1890, owned a railroad track on and along said Twelfth street, and with the permission of the city of St. Louis operated its cars along and over said track, and that said Twelfth street was then a public street of the city of St. Louis; and the defendant Union Depot Railroad Company, at the time and place plaintiffs' said son was injured, negligently run and operated its cars and horses by which said son was hurt over and along said railroad track so rapidly as to endanger the safety of persons crossing or coming on said street at the point where said son was hurt, and if the jury further believe from the evidence that on June 25, 1890, Edward W. Stanley, the said son of plaintiffs, while crossing or passing along said street, was, as the direct consequence of running and operating said car and horses so rapidly as aforesaid, run against and knocked down by the said horses drawing said car of defendant Union Depot Railroad Company, and was run over and hurt by said horses or car, and so injured that he died from the effect thereof." The instructions given on behalf of the defendant the Union Depot Railroad Company, defined "ordinary care," in the fourth, as follows: "(4) By the term 'negligence,' as used in these instructions, is meant the want of ordinary care, and by the term 'ordinary care' is meant such care as persons of ordinary prudence and caution would exercise in the same situation and under the same circumstances.

It will be observed that the plaintiffs do not complain of the instructions given for defendant. If the court, in the instructions given, correctly and fairly defined the law of negligence in so far as it was applicable to the facts of the case, then it was not error to refuse other instructions, whether they embodied correct propositions of law or not. This, of course, raises the inquiry, what measure of care the street-car company owed to the little boy when he was attempting to cross its tracks in front of the car. We think there cannot be any

Care required
of company.

doubt that the rule in this state requires ordinary care in such a case, and that ordinary care, under the rule, is such care as persons of ordinary prudence would exercise in the same situation and under the same circumstances. In *Frick v. Railroad Co.*, 75 Mo. 595, this court, in discussing the measure of responsibility of a railroad company to travellers and others on its tracks at crossings, and at points between streets, held that greater care is to be exercised by those in charge of the train in a city or town than in the country; but in defining this care in such cases said: "In any case, the requisite degree of vigilance may be properly designated by the words 'ordinary care;' that is, such care as would be ordinarily used by prudent persons performing a like service under similar circumstances." This rule has been steadily maintained in this court since that decision. It is one that enables each jury in each recurring case to say, after a careful survey of all the facts, whether a party has used that care that an ordinarily prudent person would have used under similar circumstances. It is one that is susceptible of practical application. It furnishes the measure required by the law, and leaves to the triors of the fact the determination of the facts and fixing the liability under that rule. It is sufficiently elastic to meet the most aggravated case, or one containing the slightest negligence. By adhering to it the trial court avoids the common vice of commenting on the facts and invading the province of the jury. *Wilkins v. Railway Co.*, 101 Mo. 93; *Guenther v. Railway Co.*, 95 Mo. 286, 2 Shear. & R. Neg. § 475.

The instructions given came fully up to this requirement, and there was no error in refusing the third instruction of plaintiffs. It undertook to lay down a rule of diligence and vigilance which is incapable of legal measurement. It indicated something more than ordinary care, and fell short of that extraordinary care which carriers owe to passengers. We think it an uncalled for innovation in the practice in these cases, and, if followed, would lead to confusion in the minds of the jury. If it required more than ordinary care, there is no warrant for it in law. If it only required ordinary care, then it was unnecessary, as that had been correctly defined in the other instructions. This court has more than once condemned the practice of making excerpts from the opinion or argument of the judge in the instructions in a case. The instructions should be so framed as to aid the jury, who are not lawyers, to understand the law of the case; and many expressions that are grasped at a glance by the lawyer would be wholly misleading to the average jurors. As the question of the street-railway's liability was fairly submitted to the jury, upon competent evidence, we have no right to disturb their

verdict, and the judgment as to the Union Depot Railroad Company is affirmed.

2. The right to recover against the city is predicated upon the law that holds it responsible for nuisances in its streets that were known to be such by its proper authorities,

Negligence of
construction
company—
Negligence of
city.

ties, or by the exercise of ordinary care upon their part could have been known. It is not claimed it had any active agency in the death of the little boy, further than giving the Heman Construction Company a contract to build the sewer;

and all idea of intentional connivance in creating a dangerous place on its streets is negatived by its ordinance, in evidence, which required the construction company to so place the excavated material as not to interfere with travel on the street, or incommode occupants of adjoining property, and observe all ordinances in relation to obstructing streets, maintaining signals, and keeping open passageways. So that, if liable at all, it was for negligence in permitting the construction company to violate its own ordinances by creating and maintaining a nuisance. As its liability depends, then, upon that, it is essential to know in what respect the Heman Company was negligent. The charge in the petition is that some three weeks before the death of the little boy this construction company, by virtue of its contract to construct the Thirteenth street sewer, had made an excavation on the west side of Twelfth street, just north of the Twelfth street Bridge, about 200 feet long, 5 feet deep, and 8 or 10 feet wide; that in making this excavation it took up the granite blocks with which the street was paved, and piled them along the eastern edge of the excavation between the excavation and the travelled street; that it negligently did this. It is further alleged that it negligently left an open space or aperture in this temporary wall, at a point about 9 feet north of Twelfth street bridge, and built a bridge connecting this aperture with the sidewalk along the west side of Twelfth street, in such a manner that pedestrians crossing said foot-bridge from the sidewalk to the street were obliged to step out of and through said aperture immediately upon said railroad track, and in front of approaching cars. Said ditch and wall extended from Spruce street, which crosses Twelfth street at right angles, alongside of said railroad track to the north end of said Twelfth street bridge, and pedestrians passing in either direction along the west side of said Twelfth street were unable to cross said ditch and wall and go upon or over said Twelfth street bridge at any other place or in any other way than across said foot-bridge, and through said aperture, upon and over said railroad track, and in front of approaching cars as aforesaid.

It cannot certainly be successfully maintained that a municipal corporation may not lawfully dig sewers so as to drain the city and promote the health of the inhabitants. It is the right and duty of the city to have a proper sewer system. There is, then, nothing reprehensible in the purpose of the excavation itself, nothing that would denote indifference to the interests of the public, either in providing for the construction of the sewer or the ordinance under which it was built. No improvements in a city could be made if such a rule were adopted. Temporary inconvenience must be submitted to in building houses abutting on the streets, and laying pipes and making sewers in cities. Of course, for negligence in leaving the same in an unguarded condition, or without signals, the city and contractor would be liable. But while it was alleged that the wall was negligently built, and the bridge negligently constructed, it is not pretended that any defect in the construction of either caused the injury. The boy was not hurt by the falling of the wall. He did not fall in the ditch because the bridge was too narrow, or otherwise defective. He did not wander into the sewer for want of signals or guards. Although it is alleged that it was negligent to build it on the east side of the excavation, it is evident that this of itself did not cause the injury; indeed, it would seem that it would have ordinarily afforded more safety to the public.

As to the opening in the wall, it would seem that the construction company was endeavoring to avoid obstructing the street, and endeavoring to facilitate travel in its accustomed route as much as possible, and this of itself was praiseworthy. So that the case is at last reduced to the charge that this wall was so constructed, and an aperture left in it, that it invited the public to step from it, immediately into a place of danger. As to this, the evidence showed without substantial contradiction that the west rail of the street-car track at this point was $4\frac{1}{2}$ to 5 feet from the east line of the granite wall, with no obstruction whatever in the walk so left, south, to the bridge. Nor was there any street-crossing connecting with this opening, nor does the evidence tend to show that this opening invited travellers to cross the street at this point, or that they had been in the habit of so doing. On the contrary, the evident intention was to enable them to continue north and south on the west side of the street, without crossing the street. This created a temporary inconvenience, but in what way did it contribute to the injury? The petition does not show how said construction company in any way caused or compelled the railroad company to act negligently in the premises; on the contrary, granting that the combination of circumstances charged was negligence on the part of the construction com-

pany, the pleader avers a state of facts which show that the said negligence of the Heman Construction Company was broken by a new, independent cause, to wit, the negligence of the Union Depot Railroad Company, without whose active agency no harm could have resulted to the boy.

There is no doubt about the proposition that joint tortfeasors are each liable, but to hold them jointly liable they should have either acted in concert or the act of one would naturally result in causing the act of the other. Now, it cannot be logically or reasonably maintained that the building of this sewer, wall, and bridge, as they were on the day of the accident, in any manner caused the Union Depot Railway to disregard the ordinances of the city as to speed, or in way relieved its drivers from the duty of keeping their teams under control, and a sharp lookout ahead. They were independent agencies; neither had the slightest control over or connection with the other. There acts, as alleged, were separate and distinct. With a space of five feet to walk in, could the sewer company reasonably anticipate that persons would blindly walk out and beyond it upon the railroad track? Could the little boy, Stanley, have heedlessly attempted to run across the street in front of the car if there had been no ditch, no bridge, no wall of granite, and no aperture in the wall? And, if so, could he have been run over by the car and killed, as he was? It is evident he could. If he could, then all these acts of the city and construction company could be discarded, and the death of the boy attributed to other causes, either to his own heedlessness or the negligence of the car company. There is, then, no necessary connection between his death and the construction of the sewer as it was.

Many refinements have been indulged in by text-writers and judges as to remote and proximate cause, and it is often difficult to place the responsibility where it should rest. The fact that the construction company may have built the granite wall too close to the car-track, and that this was afterward followed by an injury, does not make a case. The connection between the cause and effect must be established. It seems to us that under the allegations of the petition and the evidence in this case either the acts of the street-railway company or of the little boy where the proximate cause or direct cause of the injury, and that of the construction company, if at all, at most a remote cause. In the language of the cases there is no act of the construction company which in a natural and continuous sequence, unbroken by any new responsible cause, produced this most unfortunate result, and without which it would no have happened. The uncontradicted evidence shows that after the boy had passed through the wall

he had 4½ to 5 feet yet to stand or walk in before getting on the track. There was then no such position of danger as was described in the petition. As the public had never been in the habit of crossing the street at this place, but, on the contrary, had used the street along the walk left by the construction company, neither the railroad company nor the construction company could reasonably expect any one to blindly rush across the street at this place, more than at any other point; and, if not, then it cannot be said they might reasonably have anticipated the result. Had the little boy been walking south on the path of five feet left, and the extra horse had trampled on him by reason of not having room, another and different conclusion might have been reached as to both the railroad and construction company; but we have no such case before us.

When the uncontradicted facts appear in the record it is competent for us to declare as a matter of law whether they constitute negligence, and under the facts disclosed herein we think the court below should have sustained the demurrer to the evidence, both as to the city and construction company, and for failure to do so the judgment is reversed. All of this division concur.

Liability of Street Railway Companies for Injury to Persons in the Street.—See extended note, 51 Am. & Eng. R. Cas. 192. See, also, *Wall v. Helena St. R. Co.* (Mont.), 50 Am. & Eng. R. Cas. 474, and cases cited in note, 490; *Newark Pass. R. Co. v. Block*, and note, *post*.

LYNCH

v.

METROPOLITAN STREET R. Co.

(112 *Missouri*, 420.)

Negligence of Street Railway Company—Right of Traveller to Presume that Company has Complied with Law.—In an action against a street-railway company for death at a crossing, it was error to instruct the jury that the deceased had a right to presume that the defendant had complied with the law as to providing bells for its team, in the absence of knowledge to the contrary, and that the failure to have bells on the team hauling the car was negligence, and if the failure to provide the bells was the direct cause of the injury, they must find for the plaintiff, where it appeared that the accident happened in the daytime, that the street was clear from obstructions, that the team was moving at a walk, in full view of the deceased, who was well acquainted with the street and in full possession of his senses; because the instruction took from the jury the question

whether, if the boy had exercised due care, he might have discovered the absence of the bells, and because the presumption that the defendant would obey the laws and attach the bells must cease if actual knowledge to the contrary were shown.

Same—Mutual Care Required.—In such a case the defendant has a right to rely upon the exercise of ordinary prudence on the part of the plaintiff, as in this case on the part of the deceased, and the plaintiff has a right to presume due care on the part of the defendant, the obligation being mutual and correlative.

Care Required of Young Boy—Question for Jury.—In an action against a railway company of causing the death of a boy 10 years old, it was error to instruct the jury that the boy was required to exercise only such care and prudence as might be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required of a person of tender years and imperfect discretion as from a person of maturer years, while refusing the charge to the effect that he was guilty of negligence if he was old enough to know the danger of getting in front of a moving car and stooping down on the track without looking for the car, and if, in the exercise of such prudence as a boy of his age ought to exercise, he ought to have known that the car was coming, then the absence of bells could not be said to concur in causing his injury, since the instruction assumed that the boy was a boy of imperfect discretion, which was a question for the jury to determine.

Negligence of Parent Imputed to Child.—Where there was evidence that the boy's mother, the plaintiff in this case, had taken the boy out of school because of a defect in his speech, it was a question for the jury to determine whether the plaintiff, who was suing in her own right, was negligent in trusting the child alone and unattended upon a principal street of the city, where she knew that the cars were running at all times of the day, and that the streets were usually crowded.

Dealt Measure of Damages under the Statute.—The statute provides that, whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unreasonableness or criminal intent of any officer or employé while running or managing any locomotive or car, the employer shall forfeit \$5000, which may be sued for and recovered by the parent. *Held*, that the provisions of the statute covered a case where a child was killed by reason of the negligence of the street-car company to comply with an ordinance of the city requiring bells to be placed on the horses drawing the car.

APPEAL from the Jackson circuit court.

Pratt, Ferry & Hagerman, for appellant.

Beebe & Watson and *F. W. Randolph*, for respondent.

GANITT, P.J.—On the 4th day of July, 1888, Richard Lynch, a boy between 10 and 11 years of age, residing with his widowed mother, in Kansas City, Mo., within one block of Main street, the principal thoroughfare of that city, was given a nickel, with which to buy himself a "milk-shake," and was permitted by his mother, the plaintiff in this action, to go unattended to Main street to make his purchase. The defendant was operating a street horse-car railroad on said street at the time, by virtue of a city ordinance. The ordinance required the defendant to have bells on all of its

teams hauling its cars along said street to warn persons on the street of the approach of its cars. About 10 o'clock in the forenoon he was seen to pass across said street, a few feet in front of one of defendant's cars, drawn by a pair of mules, moving at that time in a walk and up a grade, near the crossing of Fourteenth street. He crossed in safety, when apparently he discovered he had dropped his money or something on the track, and immediately turned, stepped upon the track, just in front of the advancing car, stooped down, and almost instantly was struck by the mules, or one of them. The mules became frightened by stepping on the boy, and were excited by the firing of crackers in the street, and began at once to jump and plunge, drawing the front wheel of the car against the boy before they could be stopped. The boy was taken from under the car dead. He seems to have been stunned by the blow from the mule's hoof, as he made no outcry. There was some conflict in the evidence as to the distance the boy crossed in front of the car, and how far he got before he stepped back in front of the mules. It was shown and admitted there were no bells upon the mules. The petition alleges negligence in—*First*, failing to provide sufficient number of employes to man the car; *second*, that the team was unsafe; *third*, that the driver was negligent in failing to discover the boy approaching the track in time to prevent the injury; *fourth*, that the driver was negligent in failing to discover the boy in the act of crossing in time to prevent the accident; *fifth*, that the driver was negligent in not discovering the boy after he got on the track in time to prevent the injury; *sixth*, the driver failed to stop, after knocking the boy down, in time to prevent the injury; *seventh*, that defendant negligently failed to provide bells on the mules to warn persons of the approach of the car.

The court gave the following instructions for the plaintiff:

- (1) "The jury is instructed that contributory negligence is a defence, and must be proved to your satisfaction by a preponderance of all the evidence in the case." (2) "The court instructs the jury that the deceased, Richard Lynch, when crossing the track and going back upon the same, had a right to presume that defendant had complied with the law as to providing bells on said mules, in absence of knowledge to the contrary." (3) "The courts instructs the jury that it was the duty of the defendant to have bells attached to the mules drawing said street car, and if you find and believe from the evidence that at the time of the injury the bells were not attached to said mules, then the court instructs you that defendant's failure to provide said bells was negligence; and if you further find

Instructions to
jury for plain-
tiff.

and believe from the evidence that such failure to provide and attach bells to said mules was the direct cause of defendant being run over and killed without negligence on his part, as explained in these instructions, then your verdict must be for plaintiff." (4) "The jury are further instructed that if they believe from the evidence that there was a person driving said car before and at the time of said injury, then it was the duty of said person to keep a vigilant watch ahead to avoid injuring persons using said street; and if you believe from the evidence that said person might, by the exercise of reasonable care, have seen the deceased, Richard Lynch, in the act of turning around and attempting to go on the track, in time so that by the exercise of reasonable care said person might have checked said mules, and prevented them from running over deceased and causing his death, then your verdict must be for the plaintiff." (5) "Although the jury may believe from the evidence that one M. M. Heery was acting in the capacity of driver of defendant's car and mules thereto attached at the time of the injury complained of, yet if you find and believe from the evidence that by the exercise of ordinary care and prudence on said Heery's part he might have seen deceased, Richard Lynch, in a place of danger in time to have stopped the car and avoided killing him; or if, by the exercise of ordinary care and prudence, under the circumstances detailed in evidence, the said Heery, while so driving, might have avoided driving over the said Richard Lynch, and killing him, after he discovered, or by reasonable care could have discovered, his danger—then your verdict must be for plaintiff." (6) "In determining whether deceased, Richard Lynch, was guilty of contributory negligence, the jury are instructed that said Richard Lynch, son of plaintiff, was required to exercise only such care and prudence as might reasonably be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of mature years and greater discretion under similar circumstances." (7) "The jury are instructed, though you should believe from the evidence that the deceased, Richard Lynch, was negligent in going back on defendant's tracks to pick up something, yet that will not prevent a recovery if you further believe and find from the evidence that a person was driving prior to and at the time of the injury, and by the exercise of reasonable care might have discovered the deceased in the act of going back on said track in time, by the exercise of reasonable care, to have prevented the mules from running over and killing him, then your verdict must be for plaintiff."

(8) "You are instructed that there is no negligence proven against plaintiff, Ella Lynch, in this cause." (9) "If you find for the plaintiff in this cause, you will assess her damages at the sum of five thousand dollars." (12) "The jury are instructed that ordinary care, as mentioned in these instructions, depends on the circumstances and facts of each particular case or situation with reference to which the term is used. It is such care as a person of ordinary caution and prudence would usually exercise in the same situation and circumstances. The jury are further cautioned that all the instructions given to them in this cause are to be considered together, and as explanatory of each other, excepting numbers 9 and 10, which are only to be considered in the event the jury decide to return a verdict for plaintiff under the other instructions given." To the giving of each and every one of which instructions the defendant separately at the time duly excepted.

The court gave the following instructions for defendant: (2) "In this kind of a case the plaintiff is bound to aver in his petition, and prove upon the trial, some negligence on the part of the defendant which was the Instructions
for defendant. direct cause of the injury complained of, and only such acts of negligence can be considered as are submitted to your consideration by the court. In this case the plaintiff charges as negligence the following acts: *First*, that defendant neglected and failed to provide a sufficient number of employes to take charge of the car and the mules thereto attached to render the operation thereof reasonably safe; *second*, that defendant failed to furnish the servant then and there operating the car with a safe and suitable team of mules, but, on the contrary, furnished the servant with an unsafe and unsuitable team of mules to haul said car, knowing that the same were unsafe and unsuitable, or, by the exercise of reasonable care, might have known; *third*, that the servant in charge of said team and car failed to discover Richard Lynch approaching the track in time to prevent the team of mules and car from running into and injuring him; *fourth*, that the servant in charge of said car failed to discover said Richard Lynch in the act of crossing the track in time, by the exercise of ordinary care, to prevent the injury; *fifth*, the said servant failed to discover the said Richard Lynch, after he got on the track, in time to prevent the injury; *sixth*, the servant in charge of said car failed to stop it, after knocking said Richard Lynch down, in time to prevent killing him; *seventh*, that the defendant negligently and wrongfully failed to provide bells on said team of mules, to warn persons passing on said street of the approach of said car." (3) "The

court instructs the jury that they cannot consider the first act of negligence alleged and mentioned in instruction number two." (4) "The court instructs the jury that they cannot consider the second act of negligence alleged and mentioned in said instruction number two." (5) "The court instructs the jury that they cannot consider the third act of negligence alleged and mentioned in instruction number two." (6) "The court instructs the jury that they cannot consider the fourth act of negligence alleged and mentioned in instruction number two." (11) "If the Lynch boy knew that the car was approaching, or, by the exercise of such reasonable prudence as a boy of his age ought to have exercised, could have known of its approach, then it was negligence upon his part to stoop down in front of the approaching mules (if he did so)." (12) "If Richard Lynch was guilty of negligence which contributed directly to his getting injured, even though in a slight degree, and a reasonably prudent person driving the car, as soon as the boy's danger could have been seen, could not with reasonable prudence have avoided the injury, you will return a verdict for the defendant." (13) "If Richard Lynch, when he started to cross in front of the car, knew that it was approaching, then there was no negligence in failing to have bells upon the mules, even though there is an ordinance on that subject. The purpose of such an ordinance would be to give a warning of the approach of the car; and, if the boy knew of its approach, the plaintiff cannot claim that the injury was occasioned by the want of a bell." (18) "If there was a person driving the car before and up to the time of the injury, and such person, even though you find it was one Heery, a passenger in the car, exercised such care as a reasonably prudent and regular driver would have exercised in a like situation, you cannot and must not find that there was any negligence in the manner in which the car was driven." (19) "A person driving a street car is not required to stop his car because he sees a boy crossing the street. It is only when there is an appearance of danger to the boy, which a driver of reasonable prudence ought to see, that there is a duty to stop. If, after the driver saw, or, by the exercise of reasonable prudence, could have seen, the appearance of danger of a collision, and the person driving (if any one) does all that a reasonably prudent man could do in the exercise of reasonable prudence to avert the injury, and he stops the mules and car as soon as he reasonably can, then he is not negligent because it was not sooner stopped." (20) "If the direct cause of the Lynch boy being knocked down was that, after crossing the track in safety (if he did so), he suddenly, and without warning, stooped back immediately in front of

the mules (if he did so), then the person driving the car (if any one), whether it was Planck, or Heery, the passenger, or both, did not have time, acting with reasonable prudence, after the boy started back, to stop the car before one of the mules struck the boy (if it did), and if the mules suddenly became so frightened by reason of the boy being under them as to be temporarily beyond the control of the person or persons attempting to hold them (if any one), and thereby the death of the boy was caused, your verdict must be for defendant." (21) "If the jury find that Richard Lynch crossed the track in safety, and, after crossing it, suddenly and without warning stooped back in the track before the mules immediately, and there was not time after the boy started back for a person driving (if any), acting with reasonable prudence, to stop the car before the mules struck the boy, and the mules suddenly became frightened thereby, so as to be temporarily beyond the control of the person driving (if any one), thereby killing the boy, you will find a verdict for the defendant."

The court refused to take from the jury the 5th, 6th, and 7th acts of negligence mentioned in defendant's instruction No. 2. The court also refused to submit to the jury the question of plaintiff's own contributory negligence, and also refused the following two instructions: (10) "The court declares to you as a matter of law that Richard Lynch was guilty of negligence on his part if he was old enough to know the danger of getting in front of a moving car and stooping down on the track immediately in front of the mules, without looking to see if the car was approaching." (14) "If Richard Lynch, when he started to cross in front of the car, in the exercise of such reasonable prudence as a boy of his age ought to have exercised, ought to have known that the car was approaching, then there was no negligence which can be said to concur in causing the injury in failing to have the bells upon the mules, although there is an ordinance upon the subject."

The jury returned a verdict for plaintiff, assessing her damages at \$5000. Defendant in due time filed a motion for new trial, and, the court having overruled it, appeals to this court. Exceptions were duly saved.

1. After a most careful consideration, we are of the opinion that the second instruction for plaintiff ought not to have been given in this case, notwithstanding it embodies a correct proposition of law, as far as it goes. That instruction is as follows: "The court instructs the jury that the deceased, Richard Lynch, when crossing the track and going back upon the same, had a right to presume that defendant had complied with the law as to providing bells on said mules, in

Plaintiff's
right to pre-
sume compli-
ance with law.

absence of knowledge to the contrary." The court, in its third instruction for plaintiff, fully and specifically charged the jury that the failure to have bells on the mules hauling the car was negligence, and, if the failure to provide the bells was the direct cause of the injury to the boy, they must find for the plaintiff. One of the vital issues in the case was the contributory negligence of the deceased boy, Richard Lynch. The giving of this instruction, in addition to the third on the same subject, without modification, had an effect of giving undue prominence to the fact that there were no bells on the mules, and inferentially said to the jury that the boy might rely upon the presumption that there would be bells on the mules, and, if not, then he was exonerated from exercising that care and caution which might reasonably be expected of one of his age and capacity. When the facts are known and admitted, or are testified to by the witnesses, as in this case, then it is the province of the jury to pass on their legal effect, under proper instructions from the court. There is then no occasion for indulging in presumptions. "Presumption is a principle of law, by which, for the furtherance and support of right, facts not established by positive evidence are inferred from circumstances." *Matth. Pres. Ev.* The presumption invoked in this instruction is of the class denominated "disputable." Its strength and weight must necessarily be affected by the attendant facts, which will weaken or strengthen it as they accord in each case with the experience of mankind. In the instruction itself it is conceded the presumption that the defendant would obey the law, and attach the bells, must cease if actual knowledge to the contrary is shown. Now, it is evident that the opportunities for knowledge in such a case must affect the weight of this presumption. Here the evidence discloses the accident happened in the light of day. The street was clear of obstructions. The car was moving at a walk, in full view of the boy. The boy was shown to have often been on the street, living within one block of it. He crossed the street, at most, not over 15 feet in front of the car. He was not deaf. By the exercise of the slightest prudence he could have seen the car, and known there were no bells on the mules. The presumption indulged by the instruction was thus apparently negatived by the evidence of his own senses. *Milburn v. Railroad Co.*, 86 Mo. 104, 29 Am. & Eng. R. Cas. 244.

Now, is it not apparent that a charge from the court, under such a state of undisputed facts, that he might rely upon a presumption that the company would have bells on the mules, was nothing more nor less than an invitation to the jury to excuse the boy from using his senses, and observing what

was patent to every one else on the street? It was admirably adapted to turning the scale in plaintiff's favor in an evenly-balanced case, and gave undue prominence to one fact, to the exclusion of the others, and ought not to have been given. *Baker v. Pendergast*, 32 Ohio St. 494; *Jetter v. Railroad Co.*, *41 N. Y. 154. In *Moberly v. Railroad Co.*, 98 Mo. 183, the presumption was invoked in the trial court that plaintiff was in the exercise of due care when he was injured, but this court, while recognizing the presumption as correct in a proper case, held that it was reversible error to give it where the defence was contributory negligence, and where there was abundant evidence from which plaintiff's negligence might have been founded; BARCLAY, J., saying: "The jury should have been left to make such finding as they considered just on that issue, without casting into the balance such a reference to the presumption obtaining in the absence of evidence." And to the same effect are the decisions of this court in *Rapp v. Railroad Co.*, 106 Mo. 423; *Meyers v. City of Kansas* (Mo. Sup.), 18 S. W. Rep. 914; *Barr v. City of Kansas*, 105 Mo. 558, 35 Am. & Eng. Corp. Cas. 485; *Railroad Co. v. Stebbing*, 62 Md. 504.

We are cited by respondent to the case of *Correll v. Railroad Co.*, 38 Iowa, 120, in which this instruction was approved. An examination of that case will disclose that it was a case for damages for killing stock on a crossing. The instruction did not consist of the excerpt alone, which constitutes the instruction in this case. The instruction was as follows: "(6) In determining this question as to whether the plaintiff's brother exercised ordinary care, you will take into account his familiarity with the crossing, his knowledge of the regular time of the arrival of trains at the crossing, the fact as to the manner in which the horses and mules were being taken over the track, the obstructions in the way of a fair observation of an approaching train; and determine therefrom, as well as from all the other surrounding circumstances, whether he was wanting in ordinary care and prudence, as above explained, in permitting the stock to go upon the track when they did. It is not for me to say what act or acts amount to negligence on his part; this is for you to determine from all the evidence. It is proper to observe that, if the brother of the plaintiff knew of the regular time of the train, and about that time was approaching the track, a greater amount of care was required than if he was doing the act at some other time. Another thought in this connection: In determining the question as to the negligence of plaintiff's brother, he had the right, in approaching the track, to assume that the trains of the plaintiff would not be running at a rate

of speed greater than six miles an hour. In other words, all men have a right to expect that others will not violate the law." It will be seen at once that the court imposed on the plaintiff the exercise of care in crossing the track; the duty of looking for the train, which was not required in this case; and did not hesitate to sum up the controlling facts. This is understood to be the practice in that state. *State v. Carnahan*, 17 Iowa, 256; *Whitaker v. Parker*, 42 Iowa, 585; *Buford v. McGetchie*, 60 Iowa, 298. We see nothing in that case to change our view of the impropriety of giving the instruction in this case, under the facts developed. Nor do we think this instruction was cured by the instructions 11 and 13 given for defendant. While the court in these instructions told the jury that if the boy knew the car was approaching, or, by the exercise of such reasonable prudence as a boy of his age ought to have exercised, could have known of its approach, then there was no negligence in not having bells, by this instruction they were virtually told that it was prudent in him to assume that the bells were on the mules, and thus the jury were relieved of the duty of inquiring whether by looking or listening he could have discovered the want of bells; and this leads us to remark that the instruction ought never to be given in its present shape. The true statement of the rule is to be found in *O'Connor v. Railway Co.*, 94 Mo. 150, 32 Am. & Eng. R. Cas. 61, as follows: "The defendant has a right to rely upon the exercise of ordinary prudence on the part of the plaintiff, as in this case on the part of deceased. So, on the other hand, the plaintiff has the right to presume due care on the part of the defendant." In other words, the obligation is mutual and correlative, and it should be stated that a person, himself in the exercise of ordinary care or prudence, has the right to assume that others will obey the law, and to act on that belief. It cannot mean that a plaintiff may recklessly disregard all the laws of prudence himself, and yet require the defendant to observe caution in protecting him against his own imprudence.

2. This brings us to a consideration of the instructions on the question of the liability of the deceased for contributory negligence. For the plaintiff the court gave instruction No. 6: "That he was required to exercise only such care and prudence as might be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of maturer years and greater discretion under similar circumstances;" and refused instructions 10 and 14, asked by de-

Care required
of young boy.

fendant, to the effect that he was guilty of negligence if he was old enough to know the danger of getting in front of a moving car, and stooping down on the track in front of the mules, without looking to see if a car was approaching; "and if, in the exercise of such prudence as a boy of his age ought to have exercised, he ought to have known the car was coming, then the absence of the bells could not be said to concur in causing his injury." The defendant insists that in the said instruction No. 6 the trial court assumed that the boy was a person of imperfect discretion, and to do this was error. We think the criticism is just. While this boy was only required to use the discretion that might reasonably have been expected of one of his age and capacity, it was clearly the province of the jury to determine what his age and capacity were, and whether he used that discretion in this case. It was for the jury to determine whether he was of imperfect discretion with respect to the danger from this car. The jury must have understood that the boy, in the opinion of the trial judge, was of imperfect discretion; and the whole tenor of the instruction was to excuse his negligence for this reason. This was error. *State v. Hecox*, 83 Mo. 531; *Barr v. Armstrong*, 56 Mo. 577; *Eswin v. Railway Co.*, 96 Mo. 290; *Railroad Co. v. Becker*, 76 Ill. 25. This instruction was not a fair presentation of the law for another reason; it stopped short of telling the jury that before the mother could recover it must have appeared that the boy was using the care and caution of one of his age and capacity at the time of the injury.

Respondent cites us to the case of *Ostertag v. Railroad Co.*, 64 Mo. 421. This instruction was given in that case for the plaintiff, but was not discussed or approved. In that case the defendant recovered judgment below. The point relied on for reversal was the giving of the second instruction in the case for defendant, which was as follows: "No. 2. Although the same degree of care is not required on the part of a child as is required of a grown person, yet, if the jury believe that the boy, Ostertag, either knew, or was at an age to know, that it was dangerous and unsafe to sit under defendant's cars, he was required to avoid such dangerous and unsafe place, and, if he failed to do so, he was guilty of negligence." The objection was that the court improperly assumed that it was dangerous for the boy to sit under the cars. The court held that there were some things that a court may assume as negligence, and said, "No one could doubt it was hazardous to sit under the car." The defendant did not appeal, and hence we find no criticism of the plaintiff's instructions. They are copied, but not discussed. To assume that it is dangerous to

sit upon a railroad track under a train of cars is entirely different from assuming that a boy of 11 years old is of imperfect discretion. *Railroad Co. v. Becker*, 76 Ill. 25. No instruction in this case properly required the jury to find that the deceased was using the care and prudence that might be expected of one of his age and capacity when he was killed. No. 11, for defendant, came nearer doing this than any other. That, however, simply told the jury it would be negligent in the boy, if he saw the car coming, to stoop down in front of it. That was only one view of the case, and does cure the want of a proper instruction for plaintiff. The defendant's refused instruction No. 10 has the same vice as the plaintiff's sixth. It assumed the boy stooped down in front of the mules. It should have been left to the jury to say whether he did or not.

3. The court peremptorily instructed the jury that there was no negligence shown on the part of the plaintiff, Mrs. Lynch, and refused No. 15, asked by defendant:

Imputed negligence of parent. "If the jury should find that Richard Lynch was too young to be guilty of negligence, then you have a right to consider whether his mother exercised reasonable care in letting him go out upon Main street unattended. And if she did not exercise reasonable care in so doing she was guilty of negligence which, if contributing to the death of the boy, prevents a recovery in this case, unless the defendant, by its agents or servants, could by the exercise of ordinary care, have discovered him in a place of danger in time, by the exercise of ordinary care, to have avoided the injury." The question is, Did the evidence warrant the submission of Mrs. Lynch's contributory negligence to the jury? not, was she guilty of negligence as a matter of law? We do not see the inconsistency in defendant's position that is claimed by the plaintiff. Counsel says the case was tried on the theory that the boy could be guilty of contributory negligence, and hence, if he was negligent, it could not be charged his mother was. But we have seen that it is a question for the jury to say what his capacity was. If they found he had little capacity, can it be said, as a matter of law, that it might not be negligent for the parent to send or trust such a child alone and unattended upon the principal thoroughfare of a great city, where she knew the cars were running at all times of day, on the national holiday, when crowds usually congregate in great numbers?

4. There was some evidence that the mother had taken the boy out of school because of a defect in his speech. We think it was a question for the jury whether her negligence contributed to his injury. The mother was suing in her own

right. *Reilly v. Railroad Co.*, 94 Mo. 600; *Lovett v. Railway Co.*, 9 Allen, 557; *Schierhold v. Railroad Co.*, 40 Cal. 447; *Drew v. Railroad Co.*, 26 N. Y. 49; *Tobin v. Railroad Co.* (Mo. Sup.), 18 S. W. Rep. 996.

5. As to the measure of damages. Defendant does not question that, if the jury found for the plaintiff on either of the two grounds, namely: negligence in the driver in not discovering the boy, after he got on the track, in time to save him, or failure to stop, after knocking the boy down, in time to save him, the verdict should be for \$5000; but he contends that if the jury found the failure to provide bells was the cause of the injury, then the case does not fall within the first clause of section 4425. The argument is made that the want of bells is a defect, merely, in machinery, and that no one but a passenger can avail himself of this, and that it was not negligence in the managing, conducting, or running of its cars. That street railways come within the scope of section 4425 we think this clear. *Liddy v. Railway Co.*, 40 Mo. 506; *Farris v. Railway Co.*, 80 Mo. 325; *Welsh v. Railroad Co.*, 81 Mo. 469; *Werner v. Railroad Co.*, *Id.* 368. The ordinance of the city required that "bells shall at all times be attached to the animals drawing any street car." This provision stands in immediate juxtaposition with the other regulations for running the cars. Section 850 provides how many hours a day the cars shall run, at what intervals, and that after sunset no car shall run without signal-lights, and then follows the requirement of bells. It is clear these provisions were intended for the accommodation of the travelling public. In permitting these companies to occupy the streets with tracks and cars it was prudent that safeguards should be thrown around them to prevent collisions with other vehicles and pedestrians using the streets. The purpose of the bells was evidently to give notice of the approach of the car, and warn all persons off of the track. To omit the bells was to run its car in a negligent manner, and in violation of the ordinance. To have the bells attached and jingling when moving or running was the purpose of the ordinance. While the argument of appellant is most ingenious, we think the proper and fair conclusion is that, if the deceased was killed because there were no bells sounding, to warn him of the approach of the car, then his death was caused by the negligent running of the car, and, if the plaintiff recovers at all, she is entitled to \$5000.

6. We are asked simply to reverse this case without remanding it for another trial. We think there was evidence to go to the jury under proper instructions. Reasonable men

might come to different conclusions as to the care or want of care of the driver under the evidence, and, when this is the case, it is the province of a jury to determine it after hearing and seeing the witnesses. The specific objections to testimony can easily be obviated on a new trial. And we do not think there is any real conflict between plaintiff's fourth and defendant's second instruction. The seeming conflict can be readily obviated on another trial, so as to remove all doubt.

Judgment reversed and cause remanded. All concur.

Liability of Street Railway Company for Injury to Persons in the Street.
—See *Stanley v. Union Depot R. Co.* and note. *ante*, p 561.

LINCOLN RAPID TRANSIT CO.

v.

NICHOLS.

(*Nebraska Supreme Court, June 29, 1893.*)

Street Railway—Municipal Grant of Franchise—Exemption From Liability for Negligence.—The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street-railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars.

Attempt to Escape Danger — Contributory Negligence in Choice of Action.—When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one which a person acting with ordinary prudence might make, under the circumstances.

COMMISSIONERS' decision. Error to Lancaster district court.

Webster, Rose & Fisherdick, for plaintiff in error.

Adams & Scott and *I. W. Lansing*, for defendant in error.

RAGAN, C.—Mrs. Nichols sued the Lincoln Rapid Transit Company in the district court of Lancaster county, and in her petition alleged that the transit company was a corporation, and owned and operated a street railway in the city of Lincoln; that said street railway was operated by running a steam-engine on and along its track, with coaches attached; that said engine is frightful to horses

Case stated.

and teams coming in view of or passing near it, all of which was well known to the transit company; that there was a large and almost constant travel in wagons, buggies, carriages, and other vehicles drawn by horses on the streets used by the transit company, which was well known to it; that on the 5th day of July, 1890, and prior thereto, the transit company wrongfully and without right, and negligently and carelessly, ran said engine and cars along certain streets of said city of Lincoln, on which streets there was constant travel, as above stated; that on said date, while she was driving along Twelfth street in said city, in a buggy drawn by a gentle and quiet horse, the transit company wrongfully, negligently, and carelessly, and without warning, ran said engine to and within the immediate vicinity of the place where she was driving said horse; that he became suddenly frightened and unmanageable, and in said fright upset said buggy, and threw her upon the track and ground, and greatly injured her. The transit company pleaded to this petition three defences: (1) A denial of negligence on its part; (2) a franchise from the electors of the city of Lincoln to operate its street railway; (3) contributory negligence on the part of Mrs. Nichols. There was a trial to a jury, with a verdict and judgment for Mrs. Nichols, and the transit company brings the case here, and assigns as errors the refusing of instructions requested by it, the giving of instructions objected to by it, and that the evidence does not sustain the verdict.

The instructions requested by the transit company and refused are as follows: "(4) If the jury find that the plaintiff had a fractious or skittish horse, or that the plaintiff was not a proper driver of the horse that was hitched to her vehicle, they will find for the defendant. (5) If the jury find that plaintiff, by her incompetence as a driver, or by carelessness in any way, contributed to the accident, the jury will find for the defendant. (6) If the jury find that horses generally are not frightened by the motor-engine of the defendant, and that the machine was operated with ordinary and usual care at the time of the accident, they will find for the defendant. If the jury find that the plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, or become unmanageable, then it was the duty of the plaintiff to have turned about, and to have done all she could to have avoided the accident; and, if the jury find that the plaintiff did not so do, they will find for the defendant."

Instructions
considered.

The fourth was correctly refused. Whether Mrs. Nichols' horse was fractious or skittish, or whether she was proper driver, were proper questions for the jury to consider in de-

termining whether Mrs. Nichols was guilty of contributory negligence. This instruction leaves out entirely the element of negligence on the part of the transit company. If the negligence of the transit company was the proximate cause of Mrs. Nichols' injury, the fact of her horse being fractious or skittish, or she a poor driver, would not relieve the transit company from liability. Again, the trial judge, in the tenth paragraph of his charge to the jury, told them: "If you should find from the evidence that the horse driven by plaintiff was a fractious or skittish horse, or that the plaintiff was not a proper driver of said horse, then plaintiff would be guilty of negligence in driving the horse in the vicinity of the motor, and could not recover." So it appears that the transit company has had the benefit of the instruction which it claims was erroneously refused. Certainly the transit company was not entitled to an instruction so broad as the one that was given.

As to instruction No. 5, asked by the transit company and refused, this was also substantially given in paragraph No. 10 of the court's charge, and it was also covered by instruction No. 7 given to the jury at the request of the transit company. That instruction reads as follows: "If the jury find that plaintiff, after she found that her horse was alarmed at the motor, used her whip, or otherwise endeavored to force her horse forward toward the motor, and compelled him to approach the object that frightened him, such conduct is negligence on plaintiff's part, and they will find for the defendant."

As to instruction No. 6, requested by the transit company and refused, it was substantially given by the trial judge in the latter part of paragraph No. 10 of his charge to the jury as follows: "And further, if you should find from the evidence that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, and threatened accident, then it was the duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovering."

Complaint is also made because the court gave to the jury the following instruction: "Whether or not horses are generally frightened by the motor-engine of the defendant is a matter that you may take into consideration in determining the negligence of the defendant in causing the accident complained of, or the contributory negligence of the plaintiff as

to her actions in the vicinity of the motor." Suffice it to say that there was no error in the giving of this instruction.

The transit company also claims that the court erred in giving to the jury the following instruction: "Third. When a plaintiff, through the negligence of defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible, he acts wildly or negligently, and suffers in consequence, such negligent conduct, under the circumstances, is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that presence of mind and carefulness that are justly required of a careful and prudent man under ordinary circumstances." This instruction told the jury, in effect, that if they found that Mrs. Nichols, while placed in a dangerous situation through the transit company's negligence, was frightened and in terror, and acted carelessly and was injured, her conduct, under such circumstances, was not contributory negligence; as a person in great peril is not required to exercise the care demanded of a careful person under ordinary circumstances.

Care required
in choosing
perilous alter-
native.

"A choice of evils may often be all that is left to a man, and he is not to blame if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty and danger at the time, and compelled to decide hurriedly." *Gumz v. Railway Co.*, 52 Wis. 672. 5 Am. & Eng. R. Cas. 583; *Siegrist v. Arnot*, 10 Mo. App. 197; *Wilson v. Railway Co.*, 26 Minn. 278; *Cuyler v. Dicker*, 20 Hun, 177. "When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make." *Cook v. Parham*, 24 Ala. 21; *Karr v. Parks*, 40 Cal. 188; *Coal Co. v. Herler*, 84 Ill. 126; *Railway Co. v. Becker*, 76 Ill. 25; *Frink v. Potter*, 17 Ill. 406; *Linnehan v. Sampson*, 126 Mass. 506; *Railway Co. v. Warner*, 89 Pa. St. 59; *Wilson v. Railway Co.*, 26 Minn. 278; *Stokes v. Soltenstali*, 13 Pet. 181; *Stickney v. Maidstone*, 30 Vt. 738; *Paige v. Bucksport*, 64 Me. 51. And this is the true rule, though a person would not have been injured had he not made an attempt to escape the threatened danger. *Railway Co. v. Mowery*, 36 Ohio St. 418; *Wilson v. Railway Co.*, 26 Minn. 278; *Schultz v. Railway Co.*, 44 Wis. 638; *Gumz v. Railway Co.*, 52 Wis. 672, 5 Am. & Eng. R. Cas. 583.

When the accident occurred, Mrs. Nichols and the transit

company's engine were approaching one another, and the contention of the transit company is that Mrs. Nichols should have turned about and made an effort to escape, and, in not doing so, she was guilty of contributory negligence. The evidence is that on one side of the street stones were piled up for curbing purposes, and she could not turn out on that side. To turn the other way, she would have to cross the street railway track in front of the coming locomotive. That she was frightened, her horse terrified, and practically unmanageable. Had she attempted to cross the track, and been struck when crossing, that would have been alleged here as contributory negligence. She may not have chosen the wiser or safer course. The trial judge told the jury: "If you should find that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, and threatened accident, then it was the duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid the accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovery." The instruction complained of, then, while not very happily expressed, stated the law correctly, and was properly given, in view of paragraph No. 10 of the charge of the trial judge.

The transit company insists that the verdict of the jury is not supported by the evidence, and this assumption is based on the contention that the evidence shows no negligence on the part of the company. The grounds of negligence charged to the transit company by Mrs. Nichols in her petition were that it operated its street railway by running a steam-engine on its track through a populous part of the city of Lincoln, and on streets in which there was constant travel of vehicles drawn by horses, and that said steam-engine was of itself frightful to horses, and that on the day of the accident the transit company negligently and carelessly and without warning ran the engine in the immediate vicinity of herself and horse, and so frightened the latter that he became unmanageable, upset her buggy, and injured her. The transit company, in its answer, said: "Denies that its character of machinery is frightful to horses; denies that on July 5, 1890, it negligently or carelessly ran its motor; and denies that it wrongfully, negligently, or carelessly, and without warning, ran its engine to the vicinity where plaintiff was driving, or that her horse became frightened, scared, or unmanageable."

Here, then, we have made these issues: Whether the transit company's steam-engine was frightful to horses; whether it

was negligent to use a steam-engine on its tracks through a populous city, and on much-travelled streets; and whether the transit company's servants in charge of the engine and cars at the time of the accident were guilty of negligence in their management of the locomotive. There is evidence in the record tending to support the allegations that the engine, with its smoke and steam and noise, was frightful to horses. There was evidence that at the time of the accident the engine was running fast, and puffing smoke; that the persons on the engine saw Mrs. Nichols when some distance away; saw that her horse was frightened; that the engine ran within 10 feet of her horse before the buggy was upset; that the engine ran so close to her she could not turn and get away. Of course, the evidence on nearly all these points was conflicting. It was a question for the jury to determine. The law has not clothed this court with authority to find conclusions of fact in cases of this character.

It is not necessary to the support of the judgment in this case that we should decide that the using of steam-engines by the transit company in the operation of its street railway was negligence of itself, but we have an abiding conviction that it was. Here was a large and populous commercial city, whose streets were constantly filled with persons on horseback, in buggies, wagons, and carriages; men, women, and even little children, were using these streets for business, pleasure, or recreation. A corporation or individual who would put a steam-engine on a street railway in such streets must have done so with a reckless disregard and an utter contempt for the lives and limbs of human beings.

Negligence in
use of steam-
engine.

An examination of the charter of the transit company does not disclose any authority for propelling its street cars by steam, and it is doubtful if any such authority was conferred by that instrument; and, if it was, the company's franchise would not excuse it from liability for injuries caused by its negligence, whether such negligence consisted in the mismanagement of its roads and cars or in the character of the motive power employed.

Charter ex-
emption from
liability for
negligence.

The judgment of the district court was right, and the same is affirmed. The other commissioners concur.

NEWARK PASSENGER R. CO.

v.

BLOCK.

(New Jersey Court of Errors and Appeals, Dec. 5, 1893.)

Negligence of Street Railway Company—Duty of Trial Judge in Directing Verdict.—When a trial judge is requested to nonsuit or direct a verdict in the trial of an action to enforce a liability for negligence, his duty is to determine whether facts have been established by evidence from which negligence may be reasonably inferred. If the real facts are in substantial dispute, the case cannot be taken from the jury.

Same—Respective Duties of Street Railway Company and Pedestrians.—The rule requiring one exercising his lawful rights, in a place where the exercise or lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made.

Care Required in Propelling Street Cars by Electricity.—Street cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.

ERROR to supreme court.

Fanny Block, the defendant in error, brought an action of tort against the Newark Passenger Railway Company, the plaintiff in error, in the Essex circuit, to recover damages for an injury received from a car of the company running in a public street. After the evidence was all in, counsel for the railway company requested the judge to direct a verdict in its favor. The request was refused, and exception was taken. Other exceptions were taken to the charge, and to refusals to charge as requested. After judgment in favor of defendant in error, the cause was removed by writ of error to the supreme court, and error was assigned on the exceptions. The judgment was there affirmed.

Anthony Q. Keasbey and Edward Q. Keasbey, for plaintiff in error.

Louis Hood and Samuel Kalisch, for defendant in error.

MAGIE, J.—In support of the assignment of errors founded

on the exception to the refusal of the trial judge to direct a verdict for plaintiff in error, it is insisted that the evidence (all of which is contained in the bill of exceptions showed that there was no negligence on its part producing the injury for which the action was brought, but that there was negligence on the part of the defendant in error producing, or contributing to produce, her injury. In reviewing a judgment founded on verdict directed by the trial judge after the whole evidence was in, this court declared that a jury should only be controlled in its verdict by a peremptory instruction when the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition thereto, or, as the learned chancellor who delivered the opinion said: "To put it more forcibly and more accurately, if the evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled." *Crue v. Caldwell*, 52 N. J. Law, 215. This rule must furnish the test of the propriety of refusing a peremptory direction to find a verdict. It has been questioned elsewhere whether, in actions to enforce a liability arising from negligence, the trial judge can withdraw from the jury, by nonsuit or direction for a verdict, the question of negligence, which is a mixed question of law and fact. In this state the power of the trial judge to nonsuit has been exercised and approved for many years in a long line of cases too familiar to need to be referred to. The power to direct a verdict is identical with, and rests upon the same foundation as, the power to nonsuit. When in such cases the trial judge is requested to nonsuit or to direct a verdict, his duty is, as well expressed by Lord Chancellor CAIRNS in *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. It follows that, if the real facts have not been established by the evidence but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the

Duty of trial
judge in di-
recting ver-
dict.

jury. *Moebus v. Becker*, 46 N. J. Law, 41; *Railroad Co. v. Shelton* (N. J. Err. & App.), 26 Atl. 937. When this request was made, it was obviously impossible for the trial judge to say what facts had been established. The evidence was contradictory to a degree unusual even in cases of this sort. It was impossible of reconciliation, and the real facts could only be determined by the jury settling the credit to be given to witnesses, and weighing and comparing their variant testimony. Under such circumstances it would have been error to withdraw the case from the jury.

The argument in behalf of the plaintiff in error is next addressed to an exception taken to the ruling of the trial judge upon a request to charge. To make the request intelligible it should be stated that the evidence of defendant in error in respect to the mode

Respective
duties of com-
pany and
pedestrian.

in which she received her injury was that she was struck and run over by a car of plaintiff in error, propelled by electricity, and running on the west-bound or north street car-track in Springfield avenue, in Newark; that, when struck, she was crossing the avenue from south to north on a cross-walk at the intersection of Prince street with the avenue; that an east-bound car running on the south street car-track had stopped upon the crossing, and she had waited until it passed, when she went on, "looking both sides;" that, not seeing any west-bound car, she stepped on that track, and was immediately struck and run over. It appeared by the evidence of witnesses called by her that the east-bound car stopped at the crossing and went on, and the west-bound car passed it, running at great speed, and without giving signals; one witness estimated the speed at 15 miles an hour. The request in question was as follows: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another was coming; and if she neglected that duty she was guilty of contributory negligence, and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed—the track being straight, and the car visible far enough to avoid it at any possible speed." The judge declined to charge in that respect otherwise than he had charged, and this exception was taken. The request is open to criticism as asserting a fact respecting the distance at which a car was visible, which was in dispute. But it may be considered, however, as raising the question of the duty of the injured person under the

circumstances above set out, and whether the request correctly states that duty.

It is first contended that the question of duty in this case is affected by the fact that defendant in error was crossing a highway along which cars propelled by electricity constantly ran. It is argued that the duty to take precaution against danger varies with the degree of peril; that the lawful use of a highway by such cars has, by reason of their running at greater speed, created additional danger to others using the highway; and that their duty in respect to such danger has thus been enhanced and enlarged. It is even insisted that the duty of persons traversing highways on which such cars run is like that imposed on persons passing along a highway where it is crossed at grade by a railroad operated by steam power. It is not pretended, and the case does not show, that plaintiff in error has acquired by legislative grant any right to run its cars in the highway at any rate of speed. Such a grant to use a rate of speed in highways which would be destructive of its customary use by others, and incompatible therewith, would not be within legislative competency, except on compensation made to the owners of the land traversed by the highway. Public highways have been acquired by dedication or condemnation for the use of the public in passing and repassing. Up to very recent times the public have used the rights of passing and repassing on highways, on foot or on horse back, or in vehicles drawn by horses or other animals. When authority was granted to lay rails on highways, and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that no additional burden was imposed by such grant. That doctrine was adopted in this state. *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq. 267, 1 Am. & Eng. R. Cas. 190. But it must be conceded that a grant of a right to use the highway in a mode incompatible with its customary use by the public would impose an additional burden, and could not be made without compensation. The public has acquired such rights in the use of highways as the owners of the lands traversed thereby have yielded or been deprived of, and it may not be restricted in the enjoyment of such rights by a use of the highway inconsistent and incompatible therewith, at least without legislative grant. Whether the public rights thus acquired may be

thus diminished or destroyed by legislative grant when no compensation is made to land-owners is not a question involved in this case, and no opinion is intended to be expressed thereon.

As has been stated, no legislative grant in this case is shown. The contention of plaintiff in error rather takes this shape: It asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands, for passengers carried in such cars, what is called "rapid transit;" and it draws the inference that its cars may therefore be run at such speed as will satisfy the public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary proportions. I am unable to subscribe to the notion which, carried to its logical conclusion, would permit this company, and other companies running cars in public highways propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law, to require. The right to use the highways by such cars is not paramount to the rights of others in the customary use thereof. It must be used in a manner consistent with such rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit. There is no just analogy between the right of a street-railway running such cars longitudinally along the highway and the right of a railroad company running its trains across a highway at grade. The latter company acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it with an additional easement. By legislative grant it uses the easement so acquired in the passage of trains run at great speed, and to a certain extent the public easement of passage is, at such crossings, modified. No grant for the acquisition and use of such additional easement has been made to the street railways, and in the absence of such grant no right to run cars at excessive rates of speed exists. Their only right in this respect is to run at such rate as will not interfere with the customary use of the highway by others of the public with safety.

Let us now consider whether the request under consideration correctly states the duty of defendant in error under the circumstances supposed. The duty devolving on one using a highway for passage on foot varies with the circumstances which are infinitely various. It may be one degree when the

highway is a quiet country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles and the differing rates of speed at which they are moving, and by reason of different opportunities of observation. It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances. From this rule it may be said, in general, that one who passes on foot along a sidewalk or foot-path of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles and a like judgment when and how to cross without collision. In the latter case, doubtless, the degree of care required exceeds that required in the former case, not because the right of the foot-passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed; it cannot be so quickly stopped or diverted from its course. A street car cannot deviate from its track, while the passer on foot may quickly stop, turn aside, or even retrace his steps. So, it may also be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made.

But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such a rule of duty were adopted and practised in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety. Under this rule the defendant in error should doubtless have waited until she could have observed any west-bound car which, travelling at customary and reasonably safe speed, might imperil her in

crossing; but she was not bound to delay until she could have seen any car on that track at any distance, coming with excessive and dangerous speed. The charge was ample and correct on this subject, and the instruction asked for was properly refused.

The trial judge was further requested to charge that any one approaching a crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with the moving car; and "if, by looking, the plaintiff could have seen and so avoided an approaching car, she cannot recover." The request was not refused, but the trial judge said that he had "charged substantially according to his understanding of the law on that subject." An exception was taken to the charge so far as it did not embrace "that secondary proposition." Such an exception does not draw into review an omission in the charge. If counsel conceived that a pertinent proposition of law had been omitted, he should have specifically requested the desired instruction, and excepted to a refusal. If the proposition in question had been requested and refused, I think there would have been no error. It is a proposition applicable to the crossing of the highway by the lines of a steam railroad. It is inapplicable to the crossing of a street railway, the cars on which must not exceed such speed as will permit the lawful, customary use of the highway by others with reasonable safety. Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision; but, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing.

Other requests to charge, the judge declined to give otherwise than already given. The charge correctly stated the law in the particulars covered by these requests, and there was no error in declining to repeat, in other language, the doctrines already laid down as law.

The remaining exceptions are portions of the charge which, it is urged, tended to improperly affect the jury. But the charge imposed on the jury, in the plainest terms, the duty of deciding the disputed questions in fact, and settling the inferences to be drawn therefrom. When that is done, comments, or even expressions of opinion, by the judge upon the evidence, are not open to exception. *Engle v. State*, 50 N. J. Law 272, and cases cited. I may add that, if the rule were different, the language of the charge is not, in my opinion,

open to any criticism of this sort. No error being found, the judgment below should be affirmed.

Street Railway Crossings—Rights of Pedestrians.—In *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, in confirming a verdict of the jury for the plaintiff, on the ground that there was no absence of substantial evidence to support the verdict, the court, in commenting upon the rights of pedestrians at street-railway crossings, said: "Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam-railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly. *Shea v. Railroad Co.*, 44 Cal. 414; *Swain v. Railroad Co.*, 93 Cal. 183, 1 Thomp. Neg. p. 396, and cases there cited. Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care. Ordinary care is all that is required; and ordinary care is that degree of care which people of ordinarily prudent habits—'people in general'—could be reasonably expected to exercise under the circumstances of a given case."

Obedience Signal of Watchman—Traveller not Relieved from Care.—In *Haney v. Pittsburgh, A. & M. T. Co.* (Pa., Dec. 30, 1893.), 28 Atl. Rep. 235, it was held that though plaintiff, who was in a safe position, was signalled to cross the track by the company's watchman, he could not recover, unless he acted as a prudent man would have done in attempting to cross the track.

Street Railways—Personal Injuries—Negligence of Child.—In *Sheets v. Connolly St. R. Co.*, 54 N. J. 518, it appeared that an intelligent child, 10 years old, was crossing a public street by a diagonal cross-walk. There were no obstructions to view, and no passing vehicles, except a horse-car coming in a direction toward the child, and which, had she looked in the direction she was moving, must have been seen by her long before reaching the track. *Held*, that a verdict that she did not negligently contribute to an injury received by being knocked down by the horses attached to the car cannot be sustained.

In *Gay v. Essex Electric St. R. Co.* (Mass., May, 1893.), 84 N. E. Rep. 186, it was held that a street-car company which left its cars in the public streets with unfastened brakes, contrary to a city ordinance, though knowing that the cars would be likely to attract children, was not liable for injuries caused by the flying back of a brake to a boy who went upon the cars to play. The child was considered a trespasser, and the court said: "Assuming that there was evidence for the jury of defendant's negligence in leaving the cars in the street as it did (see *Powell v. Deveney*, 8 Cush. 300.), we then come to the question whether plaintiff's intestate is to be regarded as a trespasser, and joint actor with the other children. If he is, then the question whether he was in the exercise of due care becomes immaterial. His wrongdoing as a trespasser and joint actor would, in such event, be a cause contributing to the injury, though in doing what he did he might be doing no more than would naturally be expected from a child of his age. We think he must be regarded as a trespasser and joint actor with the other children. Leaving the cars in the street as it did was not

an invitation or license by the defendant to him to play upon them, even though defendant knew that they were calculated to attract children, and did in fact attract them. Knowledge on the defendant's part that they attracted children was not an invitation or license to them; otherwise, the fact that one knowingly maintained on his own premises an object that allured children would constitute an invitation to them. Nor could an invitation or license be implied from the negligence of the defendant, if there was negligence, in leaving the cars in the street. The most that can be said for the plaintiff is that the defendant, knowing that the cars would be, and were, attractive to children, was bound to anticipate what actually occurred, and to exercise a corresponding degree of care to see that the cars were securely fastened and guarded, and is liable for an injury occurring to the plaintiff's intestate through its failure to do so. This assumes that all that the plaintiff is required to show is that his intestate acted as reasonably might be expected of him. But he might do that, and still be a wrongdoer and trespasser, and contribute by his conduct to the injury which he received. If he did, then the fact of his youth, and the fact that the defendant's negligence also contributed to it, would not render the defendant liable. If the cars had been set in motion by other children, and the plaintiff's intestate had been injured by them while lawfully upon the highway, the defendant, clearly, would have been liable. *Lane v. Atlantic Works*, 107 Mass. 104, 111 Mass. 186. But he was using the highway and the cars for play, and was a joint actor with other children in causing that to happen which resulted in his injury. We might fairly assume, if it were necessary, that a boy 10 years of age, and of ordinary intelligence, would know that he had no right to play upon cars which a street-railway company had left standing in the streets. Upon the declaration, as we interpret it, we do not think that, under the decisions in this state, the plaintiff is entitled to recover. See cases, *supra*; also, *McAlpin v. Powell*, 70 N. Y. 126. It is possible a different result might be reached in the English courts, though the law does not seem to be finally settled there (*Lynch v. Nurdin*, 1 Adol. & E. [N. S.], 29; *Hughes v. Macfie*, 3 Hurl. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Clark v. Chambers*, 3 Q. B. Div. 327), or in other courts in this country (*Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Railway Co.*, 21 Minn. 209; *Railway Co. v. Fitzsimmons*, 22 Kan. 686)."

Negligence of Nurse Imputed to Parents of Child.—In *Schlenks v. Central Pass. R. Co.* (Ky., Oct. 19, 1893.), 23 S. W. Rep. 589, it was held, in an action for the death of a child run over by a street car at a crossing, that the negligence of a nurse, on account of which the child in her charge was injured, was imputable to the parents of the child.

Duty of Traveller to Stop and Listen.—In *Shea v. St. Paul City R. Co.*, 50 Minn. 395, it was held that the degree of care required at the crossing of a highway and an ordinary steam-railroad is not the test of care required in crossing the track of a street railroad on a public street. Hence the rule in the former case that one approaching the crossing must look up and down the track before attempting to cross is not necessarily applicable to the latter. The failure to do so is not, as a matter of law, negligence. The court said: "The evidence shows that if, after he got beyond the obstruction of the building on the corner, he had looked northward as well as southward, he could have seen the approaching car in time to have stopped his team before getting in dangerous proximity to the car-track, and his failure to do so is claimed to be negligence *per se*, under the rule, so often applied by this and other courts, that it is the duty of a traveller on approaching a railroad-crossing to look both ways for approaching trains before attempting to cross the railroad track. The fallacy in this, which runs all through counsel's argument, is in assuming that the degree

of care required at the crossing of a highway and an ordinary steam railroad is the test of the care required in crossing the track of a street railroad on a public street. The two cases are not alike. In the first place, street cars do not, or at least ought not to, run at the same rate of speed, are not attended with the same danger, and are not so difficult to stop quickly, as those of an ordinary railroad. In the next place, the cars of a street railway have not the same right to the use of the track over which they travel. The ordinary railroad is itself a highway, and has a proprietary interest in and to its right of way, even where the public have an easement for highway purposes over the same ground. Public necessity requires that the rights of a traveller on a highway across an ordinary railroad should be, to a certain extent, subordinate to those of the railroad company. But a street railway is not a highway. A street railway company has a mere right to use the street in common with the public generally. It is merely in aid of the identical use for which the street was created, and not a new and independent one, and it is on that very ground that a street-railway company is not required to pay compensation to the owners of abutting property. Street cars are in the main governed by the same rules as other vehicles on the street, and their owners have only an equal right with the travelling public to use the street—they have no proprietary right to any part of the street. Of course there are some modifications of this general rule growing out of the necessities of the situation. For example, as street cars run on a track, they cannot turn out to one side of it. Hence what is called 'the law of the road' does not apply to them. It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rule of equality of rights between street cars and other vehicles used on a street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars. Defendant's requests to charge, the refusal to give which is assigned as error, are framed upon the theory that the street railway has such a proprietary and superior right to the part of the street where its track is laid that the duty of taking care to avoid collisions rests exclusively upon other 'wayfarers.' For example, the second request was that 'it is the duty of wayfarers using the street where railway tracks are laid to keep out of the way of trains of cars which are being operated thereon;' and the third was that 'the conductor or trainmen in charge of such train or car upon the street has a right to assume that wayfarers will keep out of the way of approaching cars which are being operated upon the track of the railway.' These requests are framed upon an erroneous theory as to the respective rights and duties of street railway companies and others in the use of the street, and were properly refused. And, for the reasons already suggested, the rule that one approaching a railroad crossing upon a highway must look up and down the track before he attempts to cross is not applicable, as a hard and fast rule, to one who attempts to cross a street car track upon a public street. The failure to do so is not, as a matter of law, and without regard to circumstances, negligence. Notwithstanding plaintiff's failure to do so as soon as he might have done, the question of contributory negligence was, under the circumstances, one for the jury."

In *Highland Avenue & B. R. Co. v. Maddox* (Ala., June 22, 1893.), 13 So. Rep. 615, it was held that the plaintiff was guilty of contributory negligence so as to defeat recovery in the absence of wanton negligence on the part of the company, where in driving a wagon with curtains closed, he attempted to cross a street railway track without looking for a car at a point nearer than 75 yards from the crossing, and was struck by a car approaching him from behind.

In *Highland Avenue & B. R. Co. v. Maddox* (Ala., June 22, 1893.), 13 So. Rep. 615, it was held in an action against a street railway company for injuries to the driver of a wagon with which the defendant's car collided, that the mere fact that the defendant, at a point outside the city limits, was running its car fifteen miles an hour, and did not give a signal of approach, was not such wanton negligence as would entitle the driver of a closed wagon, attempting to cross the track without looking, to damages sustained in a collision.

GIBBONS

v.

WILKESBARRE & SUBURBAN ST. R. CO.

(155 *Pennsylvania St.* 279.)

Collision with Street Car—Injury to Team—Contributory Negligence—Choice of Routes.—In an action against a street-car company for injury to plaintiff's horses caused by collision with defendant's car, it was held that the plaintiff was not guilty of contributory negligence in selecting the street upon which the injury occurred when he might have gone another route, although the space between the track and the retaining wall was narrow, and an electric-railway causing noise calculated to frighten horses was being operated on that track.

Duty of Conductor to Keep Lookout.—The conductor of a street car was guilty of negligence in not stopping or slowing up his car, which was running at a high rate of speed, where, as soon as he came in sight of plaintiff's horses, they began to rear and jump, and the conductor saw, or ought to have seen, in the exercise of ordinary prudence, the team, and that they were frightened.

Same—Care Required of Plaintiff.—If the driver of a wagon was placed in a state of peril by the negligence of the motor-man on a street car, the company was responsible for the consequences which ensued, though the peril might have been increased by an effort made to avoid it, or might have been lessened or escaped in the exercise of unusual courage and self-possession, provided the driver used the care of an ordinarily prudent man, under all the circumstances.

Same—Same.—If the driver of a vehicle is placed in a state of peril by the negligence of those having charge of a car, the company is responsible for the consequences, since "a defendant cannot impute a want of vigilance to one injured by his act as negligence, if that very want of vigilance were the consequences of an omission of duty on his part."

APPEAL from Luzerne court of common pleas.

The charge of the court below was as follows :

"This is a case in which the cause of action, as alleged by the plaintiff, is the defendant's negligence. The defendant defends upon the ground that they were not negligent ; that if they were the plaintiff or his driver was negligent, and that that negligence contributed to the injury. We direct your

attention first to this question of contributory negligence. If the evidence satisfies you that the plaintiff or his driver was guilty of negligence, and that that contributed to the injury, then he would not be entitled to recover. The law has no means of measuring what proportion of the injury was caused by the negligence of the one party or the other. In considering this question of the plaintiff's negligence, we direct your attention to the competency of Michael to drive such a team at such a place. Was he an incompetent person to drive such a team at such a place? That is a question of fact, to be decided by you, and we have no opinion to express upon it. It has been suggested, further, that as there was another route by which he could have gone, which would have been free from danger, and as this route was a dangerous one, therefore the driver was guilty of contributory negligence in not taking the other route, although it was somewhat longer. Of course, as a general rule, every person has a right to travel on a public highway. That is what the highway is established for. But even in travelling the public highway, knowing it to be a dangerous one, if he suffers an injury when there is another route which he could take, by which he could avoid that injury and that danger, he would not be entitled to recover. The question is whether or not the plaintiff or his driver was guilty of contributory negligence in selecting this road, when, according to the evidence, he might have gone by another. We say to you that it was not contributory negligence, as matter of law, for the driver to drive on that street even though the space between the track and the retaining wall was a narrow space, and even though an electric railway, causing noise calculated to frighten horses, be operated upon that track. Whether it was in fact contributory negligence upon the part of the driver is a question to be decided by the jury from all of the circumstances in the case. It cannot be declared by the court as matter of law. We say to you that, if he drove on that street in preference to some other street, he took the risk of the ordinary perils incident to the operation of the railway thereon, and was bound to exercise care proportioned to the danger; but we do not think he undertook the risks of extraordinary perils which he had no reason to anticipate. The question will arise now, and will arise hereafter, as to what rate of speed the car was going; as to whether it was slowed up or not; whether the driver had a reason to anticipate the operation of the car in the manner that it was operated. All these are to be considered by the jury in determining whether or not the driver was guilty of contributory negligence. If the acci-

dent resulted from the operation of the road in the ordinary way,—in the way that the plaintiff or his driver had a reason to anticipate that it would be operated,—then they took the risk of that danger; but they did not take the risk of an extraordinary peril, which they had no reason to anticipate. Was it the duty of the driver to have driven on and crossed the track to the other side, where, according to the testimony, he would have been safe? He was bound to exercise the care of an ordinarily prudent man, under all of the circumstances; and if he had time to drive onto the crossing, and over onto the other side, and the horses could have been driven on there before the car came, then it would have been his duty to do so. But it is claimed here that the time was so short that it was impossible or impracticable for him to have driven the horses to that crossing, and cross over to the other side, where they would have been safe. We submit it to you, as a question of fact, whether in this particular, in view of all of the circumstances, he exercised the care of an ordinarily prudent man.

“If the plaintiff or his driver was not negligent, was the defendant’s negligence the cause of the injury? It does not necessarily follow that, because there has been an injury, that therefore there must be a recovery. The case must show negligence, and show that the negligence was the cause of the injury, and the plaintiff’s negligence did not contribute thereto.

The defendant is an incorporated company, and, by virtue of the powers given in its charter, and leave given by the corporate authorities of the city, it had a right to use the street for the operation of its electric railway. This was not an exclusive right, even between the space occupied by the rails. The general public have a right to drive upon that space, as well as the space by the side of the rails; but, as the cars must run on the rails, it necessarily follows that a driver of an ordinary vehicle has no right to use the space between the rails to the exclusion or the interruption of the use of that space by the company, so that, when it comes to a question which shall give way, of course the right of the company is superior to that part of the highway to that of an ordinary driver. The company is not liable for injury caused by frightening horses, provided it operates its road with ordinary care and prudence. It is an unavoidable incident to a lawful use of the street by a street-railway company, and if injury results to the driver of an ordinary vehicle as a consequence of frightening horses, and there is no negligence upon the part of the company, it is not liable. But while the company has the lawful right to use the street, and to cause the noises

Respective
rights of
drivers and
railroad com-
pany.

which are necessarily incident to the operation of their road by electricity, it is their duty to exercise these rights with due regard to the rights of drivers of ordinary vehicles who use the same highway. They are not warrantors of the safety of people travelling upon a highway, either as foot-passengers or drivers of vehicles. They are bound, however, to use ordinary care—the care of a man of ordinary prudence. That is the degree of care which is imposed upon them, as well as the degree of care which is imposed upon the plaintiff, or one situated as he was. It is the care of an ordinarily prudent man. But this will vary with the circumstances. The supreme court have said: 'Negligence consists in the absence of that ordinary care which a party ought to observe under the particular circumstances in which he is placed. A different degree of care is required when there is reason to apprehend danger from that which is necessary where none is to be expected.' In determining what care it was the duty of the railway to exercise, you will take into consideration the travel on the street; the width of the street; the space of the street which was left unoccupied by the railway tracks which could be used by the drivers of ordinary vehicles; the space between the track and the retaining-wall; the height of this retaining-wall at that point. All of these are to be taken into consideration by the jury in determining whether or not the railway company exercised due care in operating their road at that point. What might be a perfectly proper and safe rate of speed at one point, and under one set of circumstances, would be an unsafe and dangerous rate at another point. The jury are to take those things into consideration. Whether or not it was the duty of the railway company to give warning to persons driving on the street is an immaterial question, as we view the case. We suppose it to be their duty to give warning at crossings. Whether it was their duty to give warnings between crossings to people along or upon the highway is another matter. It is, in my judgment, entirely immaterial here. There is a dispute as to whether the bell was rung; but, as I say, I think that is an immaterial question, because, according to the testimony of the driver, he had a fair opportunity to see the car for at least nine hundred feet before it came upon him, so that there was no object in giving warning. He did see it, and, even if warning was not given, he did not suffer any consequences thereof. With regard to the rate of speed—whether or not there is a dispute as to that fact: According to the testimony of the witness Potsoski, in his judgment the car was running at the rate of fifteen miles an hour, and that it was stopped within, I think, about the length of the car, or length of the wagon. Accord-

ing to the defendant's testimony, the car was running at the rate of seven or eight miles an hour. It will be for you to inquire and decide what was the rate of speed, as nearly as you can, from the credible testimony in the case; and, second, whether that was an undue rate of speed, in view of all of the circumstances,—in view of all the surroundings,—the travel, the condition of the highway, the height of this wall, and all of these circumstances. The ordinance and contract fixing six miles as the limit of the speed of the company within the city has been introduced in evidence, and may be considered by the jury in determining the question of whether or not this was an undue rate of speed. We say to you, however, that the fact that the company has agreed with the city not to run at a higher rate of speed than six miles an hour would not be conclusive evidence that a higher rate of speed would be a negligent rate of speed at this point. That is a matter between the city and the company. It is a fact which is in evidence, but it is not a conclusive fact with the jury upon that question.

“While the defendant company, as we have said, had the right to operate its railway and run its cars upon this track, the question arises whether or not a duty rested upon the conductor of the car to stop or slow up his car; and that depends upon the decision of certain questions of fact, to which I propose now to call your attention, without going over the testimony in detail. If you find that as soon as the car came in sight the horses began to rear and jump; that the car was running at a high rate of speed; that the conductor did see, or ought to have seen, in the exercise of ordinary prudence, the team and that they were frightened,—then, in view of the width between the track and the retaining-wall, was it not the duty of the conductor to stop, or at least to slow up, his car? Would not an omission to do so be negligence? Would not a man of ordinary prudence, seeing a person approaching under such circumstances, exercise that degree of care? If so, then it would be negligence, and we submit that question of fact to you. But if the car was running at the rate of only six or eight miles an hour, and the horses did not begin to show signs of fright until the car was close at hand, and if the conductor at once stopped his car as soon as it was practicable to do so, but the horse jumped, or was pushed, or was crowded against the car, and thus injured, this was a risk which the driver assumed in driving upon the street, and the plaintiff cannot recover. You will see that it will be important for you to determine whether the facts were as alleged by the plaintiff, or alleged by the defendant; and in deciding this question of fact you will be governed by the weight of

the credible testimony in the case, and not by any sympathy or prejudice which may have arisen. In case you find in favor of the plaintiff, then he will be entitled to recover the fair market value of the horse, the cost of repairing his wagon and harness, the cost of burying the horse, and the cost of watching the horse during that half day until it could be removed. While the plaintiff is not entitled, as matter of right, to interest upon the amount of this injury, yet the jury may take into consideration, in measuring the damages, the lapse of time between the injury and the date of verdict, if they deem it proper to do so.

"Plaintiff's counsel request us to charge: '(1) The general rule is that a man is answerable for the consequences of a fault which are natural and probable, and might, therefore, be foreseen by ordinary forecast. Hence the circumstances of this case, the condition of the road at the place of accident, the apparent danger to which man and beast were exposed, the evident fact that the horses were no longer controllable, must have indicated to the mind of the car-runner the greatest danger to move his car against the team, or attempt to pass in the manner that he did, and was therefore responsible for the consequences of a rash act, and guilty, in a high degree, of negligence.' We decline to charge as requested in that point. It assumes facts which are for the jury, and not for the court. '(2) Where a party is dealing with a subject full of risk greater caution and diligence are required to prevent injury by reason of it. Hence the responsibilities undertaken by the defendants in running cars through the public streets in the manner and by the means referred to in this case, require greater care and diligence than by the more ordinary and less dangerous mode of conveyance heretofore used. But much more so in a case like this, when there was every reason to apprehend danger. It became and was his duty to stop and permit the driver to pass, and his not doing so was such negligence as leaves the defendant liable in damages for the consequences of a wrongful act.' We decline to charge as requested in that point, because it assumes facts which are to be passed upon and found by the jury if the evidence warrants, but not if the evidence does not warrant it. '(3) If the driver was placed in a state of peril by the negligence of the car-runner, the defendants are responsible for the consequences which ensued, though the jury may believe that the peril may have been increased by an effort made to avoid it, or that it might have been lessened or escaped by the exercise of unusual courage and self-possession.' We answer that point in the affirmative, provided, of course, he used ordinary care; if he used the care of an ordinarily prudent

man, under all of the circumstances. That would be the measure of his duty. He cannot be held responsible for a failure to exercise unusual courage and self-possession, provided his peril was caused by the negligence of the defendant company. '(4) If the driver was placed in a state of peril by the negligence of those having charge of the car, the defendants are responsible for the consequences, as a defendant cannot impute a want of vigilance to one injured by his act as negligence, if that very want of vigilance were the consequences of an omission of duty on his part.' This point is affirmed. Defendant's counsel request us to charge: 'That the plaintiff cannot recover, and the verdict must be for the defendant.' We decline to charge as requested in that point, and submit it to you as question of fact, under the instructions we have given."

The assignments of error were as follows: "First. The court erred in charging as follows: 'The question is whether or not the plaintiff or his driver was guilty of contributory negligence in selecting this road, when, according to the evidence, he might have gone by another. We say to you that it was not contributory negligence, as matter of law, for the driver to drive on that street, even though the space between the track and the retaining-wall was a narrow space, and even though an electric railway, causing noise calculated to frighten horses, be operated on that track.' Second. The court erred in charging as follows: 'If you find that as soon as the car came in sight the horses began to rear and jump; that the car was running at a high rate of speed; that the conductor saw, or ought to have seen, in the exercise of ordinary prudence, the team, and that they were frightened—then, in view of the width between the track and the retaining wall, was it not the duty of the conductor to stop, or at least to slow up, his car?' Third. The court erred in affirming the plaintiff's third point, as follows: '(3) If the driver was placed in a state of peril by the negligence of the car-runner, the defendants are responsible for the consequences which ensued, though the jury may believe that the peril may have been increased by an effort made to avoid it, or that it might have been lessened or escaped by the exercise of unusual courage and self-possession.' Which point the court answered as follows: 'We answer that point in the affirmative, provided, of course, he used ordinary care; if he used the care of an ordinarily prudent man, under all of the circumstances. That, of course, would be the measure of his duty. He cannot be held responsible for a failure to exercise unusual courage and self-possession, provided his peril was caused by the negligence of the defendant company.' Fourth.

The court erred in affirming the plaintiff's fourth point, as follows: '(4) If the driver was placed in a state of peril by the negligence of those having charge of the car, the defendants are responsible for the consequences, as a defendant cannot impute a want of vigilance to one injured by his act as negligence, if that very want of vigilance were the consequences of an omission of duty on his part.' Which point the court answered as follows: 'This point we affirm.' Fifth. The court erred in refusing to affirm the defendant's point, as follows: 'The plaintiff cannot recover, and the verdict must be for the defendant.' Which the court answered as follows: 'We decline to charge as requested in that point, and submit it to you as a question of fact, under the instructions given you.'

D. A. Fell, Jr., and G. R. Bedford, for appellant.

B. McManus, for appellee.

PER CURIAM.—This case depended entirely on questions of fact, which were fairly submitted to the jury in a clear and adequate charge, to which no just exception can be taken. The controlling questions were the alleged negligence of defendant's employes in charge of its car, resulting in the injury and loss of plaintiff's horse, on the one hand, and the alleged contributory negligence of plaintiff's driver, on the other. In view of the testimony, these were both questions of fact, exclusively for the consideration of the jury. To have instructed them to find for defendant company, as requested, would have been manifest error. The plaintiff's driver had as much right to be on the highway with his employer's team as the defendant had to be there with its passenger car. As was said by Mr. Justice HEYDRICK in *Gilmore v. Railway Co.*, 153 Pa. St. 31: "Street-railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own track. The public have a right to use these tracks in common with the railway companies, and therefore, while the rights of the latter are in some respects superior to those of the former, as was said in *Chrisman v. Railway Co.*, 150 Pa. St. 180, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down." The excerpts from the learned judge's charge, recited in the first and second specifications, are entirely free

from error. The instructions to the jury, therein contained, were not only warranted by the testimony, but, in the circumstances, they were necessary and appropriate. As qualified by the learned judge, plaintiff's point recited in the third specification was rightly affirmed. Plaintiff's point recited in the fourth specification was also rightly affirmed.

The verdict in favor of plaintiff is predicated of findings of facts which were clearly warranted by the testimony, and there is no reason why the judgment entered thereon should be disturbed.

Judgment affirmed.

Collisions with Street Cars—Duty of Driver.—In *Sheets v. Connolly St. R. Co.*, 54 N. J. 518, it was held that, when one duty of the driver of a horse car was to collect the fare from passengers, it was erroneous to charge that the jury, in determining the care exercised by the driver at the time of a collision, might consider the fact that one of his duties was the collection of fares, when the evidence was uncontradicted that at the time in question there were no passengers from whom to collect fares.

Speed of Car—Duty of Employés.—In *Watson v. Minneapolis St. R. Co.* (Minn., June 27, 1893.), 55 N. W. Rep. 742, it was held that, upon much-travelled streets in a city, it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it so as to avoid a collision.

Respective Rights of Cars and Other Vehicles.—In *Watson v. Minneapolis St. R. Co.* (Minn., June 27, 1893.), 55 N. W. Rep. 742, it was held that a street-railway car has no priority of way at a street-crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street-railway track to cross it, sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence *per se* in him to attempt it without looking a second time at the car.

In *Watson v. Minneapolis St. R. Co.* (Minn., June 27, 1893.), 55 N. W. Rep. 742, it was held that, at a street-crossing, as high degree of care is required of those in charge of an electric street car as of those driving other vehicles.

In *Driscoll v. West End St. R. Co.* (Mass., May 19, 1893.), 34 N. E. Rep. 171, it was held that the question of the exercise of care by both parties was for the jury, where, in an action against a street-car company for personal injuries caused by an electric car colliding with a loaded wagon, there was evidence that the plaintiff saw the car 400 feet away, when he started to drive across; that it was then light; that when he saw the car was getting close to him he "stirred up" his horses to get over the tracks; and that the driver of the car applied the brakes only when the front of the car was twenty feet from the plaintiff. The question of the respective rights of car companies and drivers of vehicles was thus considered by the court: "Street-railway companies are not subject to the provisions of Pub. St. c. 93. By Pub. St. c. 113, § 37, whoever maliciously delays or obstructs the passing of the cars on the tracks of such a company is to be punished, and by section 38, *Id.*, the company is to be punished if it wilfully or negligently obstructs the passing of carriages over a street or highway. Street-railway companies, under the decision of *Com. v. Temple*, 14 Gray, 69, in running their cars, have certain rights in the streets different from those

which belong to the drivers of ordinary vehicles, but none of these rights is directly involved in the case at bar, although it may perhaps be a fact to be considered that the plaintiff's wagon could proceed in any direction along the streets, while the defendant's car must proceed, if at all, on the line of its tracks. The drivers and conductors of street-railway cars, whatever the motive power, have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses have, for example, or that the driver of any other vehicle has. *O'Neil v. Railroad Co.*, 129 N. Y. 125. It was said in *Com. v. Temple*, that 'where the entire public, each according to his own exigencies, has a right to the use of the highway, in the absence of any special regulation by law, the right of each is equal.' 'Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot-passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their right, and regulate their own speed and movements in such a manner as not to violate the rights of such passengers. So in regard to the drivers of fast and slow carriages: each must respect the rights of the other.' In *Garrigan v. Berry*, 12 Allen, 84, it was said: 'There being no statute regulating the manner in which persons should drive when they meet at the junction of two streets, the rule of the common law applies, and each person is to use due and reasonable care, adapted to the circumstances and the place.' See *Norris v. Saxton* (Suffolk, January, 1893.), 82 N. E. Rep. 954. The plaintiff cannot recover if he was guilty of negligence which contributed to the collision, although the defendant's servants were negligent. Each party is bound to exercise due care. *Parker v. Adams*, 12 Metc. (Mass.) 415. What each ought to do when a collision may reasonably be anticipated as possible or probable if each continues to go on as he is going is usually a practical question, eminently fit for a jury to determine. *Schlenfeldt v. Norris*, 115 Mass. 17; *Wynn v. Jones*, 111 Mass. 360."

In *Winter v. Federal St. & T. V. R. Co.*, 153 Pa. St. 26, it was held that, where a person in the night-time obstructs an electric-car track with his team while unloading his wagon, he is guilty of contributory negligence which will prevent recovery for injuries to the team, though his position might be the most convenient for unloading the wagon. The court said: "Having thus obstructed the track, and relying on the obstruction as a sufficient and timely notice to the company that he was in possession of it, he proceeded to unload the safe; but, before he succeeded in removing it from the wagon, he evidently realized that his position was insecure, because he requested his employer to look out for and stop the cars, and received from the latter an assurance that he would do so. It is essential to a correct appreciation of this position to bear in mind that it was taken near 8 o'clock on a dark night in April; that the obstruction was directly across the tracks of a railway on which the cars were driven by electricity, and at a point where they ran on a descending grade. In the presence of these conditions, well known to the appellee, and in the absence of adequate cause therefor, his action in obstructing the appellant's road was negligent and reckless. It was not only an unjustifiable interference with public travel, and an inexcusable exposure of his own and the company's property to injury, and perhaps destruction, but imperilled the limbs and lives of the company's employes and passengers. If his horses were injured while in the position described by him, he is without just claim to compensation for the injury, because it was the direct result of his own negligence. Now that rapid transit is recognized and demanded as essential to the prosperity

of, and the transaction of business in, our large cities, the use of the streets for individual convenience is necessarily qualified so as to make such transit possible and to minimize its dangers. The substitution of cable and electric cars for the horse car and the omnibus is a change which renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property-owners on streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of a crossing or possession of the tracks of a railway operated by horse power is not to be compared with the peril involved in a crossing or occupancy of the tracks of a steam, cable, or electric railway." See, also, note 51 Am. & Eng. R. Cas. 196.

PENNSYLVANIA SCHUYLKILL VALLEY R. CO.

v.

PHILADELPHIA & READING R. CO.

(*Pennsylvania Supreme Court, Oct 2, 1893.*)

Occupation of Street by Railroad—Scope of Grant—Exclusive Use of Street.—A railroad company which has been granted by a city the right to select such route as may be deemed best "across or along such streets as it might find expedient to use," with authority to construct its railroad to and through the city, and to occupy so much of specified streets as might "be necessary for the construction of its track, sidings, and bridges," does not obtain by such grant an exclusive right to the occupancy of the streets designated, where the whole width of the street is not reasonably necessary.

Same—Extent of Occupancy—Subsequent Grant to Another Company.—Where a city grants to a railroad company the right to occupy so much of certain streets "as may be necessary for the construction of its track," the grantee, after having laid one track which was apparently sufficient for the accommodation of its business for many years, thereby exhausts the power conferred, where no facts point to the necessity for more than one track at the time the street was appropriated, and another railroad company, under a subsequent grant from the city, may construct its road on the portion of the said street not required for the lines of the former company, whose right of passage under its prior grant and location is in no way disturbed thereby.

APPEAL from Parks court of common pleas.

Bill to enjoin defendants from interfering with plaintiffs' track.

Philip S. Zieber, Jefferson Snyder, and Geo. F. Baer, for appellants.

Cyrus G. Derr, for appellees.

DEAN, J.—The contention here arises from the conflicting

claims of two rival railroads, plaintiffs and defendants, to the occupancy of Front and Canal streets in the city of Reading. As neither denies the power of the other, ^{Questions presented.} under its corporate grant, to occupy, with consent of the city councils, streets of the city, it would serve no useful purpose for us to raise an issue not raised by the pleadings, or to discuss a proposition not necessary to a decision of the cause. For that reason we will not attempt to answer the question, "Has a railroad company incorporated under the act of 1868 the right to occupy any street longitudinally?" so ably treated by the learned judge of the court below. It will be time enough to pass on that when the rights of parties to a cause depend on an answer to it.

Assuming, then, as these parties practically have assumed, from the commencement of this legislation down to final hearing, that it was not, in either, a usurpation of power not conferred in the grant to occupy the streets of Reading for railroad purposes, then how far are they to be restrained or restricted in the exercise of the power on these particular streets? As to the prior grants under which defendants claim,—those to the West Reading Railroad Company in 1860 and to the Berks County Railroad in 1871 and 1873,—they do not in express terms confer the exclusive ^{Right of way} right to all the surface of these streets. The first ^{—Scope of} gives the right to select such route as may be ^{grant.} deemed best, "across or along such streets as it might find expedient to use," subject to all the provisions of the general railroad act of 19th of February, 1849; and before exercising this right, the consent of the city must be first had. The second gives authority to construct a railroad to and through the city, also, a single track on these streets, subject to the consent of the city councils, who consented to the occupancy of so much of Canal and Front streets as might "be necessary for the construction of their track, sidings, and branches." The words of the grants certainly do not express an exclusive right to the occupancy of the streets. If not expressed, is it to be implied? The grant was to a private corporation of a right upon the surface of public streets.

In such cases there has never been any relaxation or modification of the rule laid down by this court in *Mayor of Allegheny v. Ohio & P. R. Co.*, 26 Pa. St. 355: "A grant by the commonwealth, or by a municipal corporation under authority derived from the commonwealth, is to be taken most strongly against the grantee, and nothing is to be taken by implication against the public, except what necessarily flows from the nature and terms of the grant." It would add nothing to the force of this statement of the law to cite the cases which, in

the last 35 years, have followed it. It is the settled law, pointedly applicable to the facts before us. The nature and terms of this grant were to construct and operate a steam railroad upon a street 60 feet wide in a large city. If, to construct and operate such a road, the whole width of the street was reasonably necessary, then the exclusive right to the whole street would necessarily flow from the nature and terms of the grant. Whether the whole of the street was necessary to the construction and operation of defendant's road is a question of fact determinable from evidence. This is the finding of the master on the testimony. "Front and Canal streets are sixty feet wide. Along the western side of these streets, at the time of filing plaintiff's bill, there was a space affording room for one additional track. That it is practical to operate two rival roads upon these streets, and that plaintiffs' railroad and defendants' railroad have already existed on these streets about seven years, have been operated for nearly six years, and have in such operation not materially interfered with each other. That defendants have ample facilities upon these streets, and have been able, in addition to the transaction of their own business thereupon, to accommodate the Wilmington & Northern Railroad Company with the use of their track upon Front and Canal streets, having for many years allowed them to run their passenger trains upon these streets.

It will be noticed that the findings here stated are not opinions, the soundness of which can be tested by the judgment of the court, when the grounds of the opinion are given. Unless the witnesses before the master falsified, these facts were established: (1) There was no open space, at the time plaintiffs located their track, along the western side of the streets, not physically in possession of defendants, of sufficient width for the construction of another track; (2) that part of the streets on which defendants' track were laid was of sufficient width, at least during the preceding years, for the transaction of their business. As, then, the words of the grant did not expressly concede the exclusive right to the streets for their full width, and the facts show, by actual use, that defendants' steam railroad can be operated on much less than 60 feet, there is no necessary implication, from the nature of the grant, that defendants, by the construction of their road upon a part, acquired a right to the whole.

It does not follow, from what we have said, that, in the interpretation of grants giving to railroads the right of passage on streets, the implication necessarily is that the right is limited to one track, or even two. The right is limited to an occupation reasonably demanded for the transaction of the business contemplated. Where, by years of actual use in the

business, it has been demonstrated what extent of occupancy is sufficient to accomplish the purpose of the grant, the extent of the use determines the extent of the grant. Had defendants been in actual occupancy of the whole surface of these streets with tracks at the time plaintiffs sought to lay a track on the western side, the question presented would have been a very different one. The probable inference then would have been, they were in the enjoyment only of that two which, from the nature of the grant, they had the right. There can be no constructive appropriation of the whole of a public street, under a right of passage, which will be effectual to bar the right of the public to the part not in actual use for the purpose granted. The presumption that the corporation has taken the general width specified in its charter has no application to the surface of public streets, where the words express, with reference to such streets, nothing more than a right of passage. Here the words are "across or along such streets," and the right to construct its road "to and through the city of Reading." In *Mayor of Allegheny v. Ohio & P. R. Co.*, already cited, the court, after stating how much more favorable to the railroad company is the implication where the grant is through land, either unoccupied or sparsely settled, say: "But the grant of a right of way through a small strip of ground designed for public uses in a densely populated city stands upon a different footing. Under such circumstances it is not reasonable to suppose that anything further was intended by either party than to contract for so much ground as shall be necessary for the line of railway alone, and that the ground so granted shall be used only for the ordinary purposes of passing and repassing thereon." While in the case just cited the grant was, by contract, of 50 feet through a public common belonging to the city, the slight difference in the facts between that case and this makes no change in the applicability of the principle. Both are grants of a passage over a surface theretofore owned and enjoyed by the public, and thereafter both, by implication, excluded the public from so much as passed by the grants.

The very point involved was passed upon by the late Justice WOODWARD, then sitting in the common pleas, in a case in which the present defendants were plaintiffs, against the Berks County Railroad Company, defendants, reported in 2 Woodw. Dec. 361. In the course of that opinion he says: "The grant was not of the streets, nor of a territory sixty feet in width, but of the right of way for a railroad. The company's interests are not to be measured by what they may have claimed or contemplated, but by what they did. The portions of the streets which they did not appropriate for the

purposes of their road belong to the plaintiffs, and are subject to their control, no more than the dozen other streets which the West Reading Company might have selected for their line, under their charter, and which they did not appropriate at all." The decision of this court in *Jones v. Railroad Co.*, 144 Pa. St. 629, is not a departure from the principles here relied upon. The facts in that case are wholly different, and what is there said by our Brother McCollum must be understood as applicable to the fact in that case. There the road was elevated 23 feet above the street; the right of the public to the surface was not disturbed. The contention was not between the railroad company and the public, or between the company and the subsequent grantee of the public, but between a lot-owner and the company, which, under a right of way for its elevated structure, had designated part of the lot for future occupancy, and refused to disclaim the right thereto.

It is argued by appellants that this interpretation of the law limits the occupation, no matter what may have been intended by the grant, to only so much of the surface of the street as was taken at the very beginning, and, although the exclusive right to the whole of the street may appear, the company must at once cover it with tracks, under the penalty of a forfeiture. The conclusion deprecated does not follow a proper invocation of the principle stated. There may be grants of a right of passage to a railroad company which, from circumstances *déhors* the written authority, such as the large amount of business to be transacted, the number of tracks outside the city, the terminal-points, and other facts, would warrant the implication that surface for more than one track was necessarily intended. It would not follow, in such case, that, immediately after one track was down and a train ran over it, the power to occupy under the grant was exhausted. There would be a reasonable time implied for the exercise of the right of physical occupancy implied. But the case on hand is, in no aspect of it, the one supposed. The grant to the West Reading was to a road five miles in length, and by actual construction only two miles. After consolidation, it became a mere siding of defendants' greater line. The city ordinance giving consent stipulated it should conform to the grade of the street; that is, a steam road should adapt its grade to one for wagons. The obvious inference is that one track would be sufficient for the right of passage for such a road. The Berks County Railroad, to whose rights defendants also succeeded, by the city ordinance had the right to but one track, and this was laid on the eastern side of the

Reasonable
time for as-
suming rights
granted.

street about the year 1873, although an unsuccessful attempt had been made before that time to lay it on the west side, covering the part now in controversy. Therefore, at the beginning, when the first appropriation under the grants was made, there were no outside facts pointing to a necessity for more than one track under a right of passage. Having laid that one track, in the one case ten, and in the other twenty, years before the controversy, the power under the grant was exhausted, not by reasonable delay in appropriation, but by its full exercise. No extension of time for further occupancy could have enlarged the scope of the grant. So, then, there is no implication that a right of passage by more than one track was intended, and, if there were, the laying of but one track could not have excluded forever the public or the public's grantees from the unoccupied part, without a reversal of well-settled rules of construction of corporate grants of public rights. What we do hold in this case, is: (1) The necessary implication from defendants' grant is, as against the public, a right of passage only on the streets in question. (2) The facts show this right was fully enjoyed for many years by an actual occupancy of only part of the surface of these streets; therefore, that extent of occupancy is all that is necessarily implied from the nature and terms of the grant. (3) Plaintiffs' location, although on the same streets, in no way interferes with or obstructs defendants in their right of passage under their prior grant and locations. Our opinion necessarily overrules the other assignments of error.

Therefore the decree of the court below is affirmed, and the appeal is dismissed, at costs of appellants.

City Granting to Two Companies Right to Lay Tracks in Street—Conflicting Claims.—See *Ft. Worth St. R. Co. v. Rosedale St. R. Co.* (Tex.), 32 Am. & Eng. R. Cas. 283.

Construction of Additional Track in Street—Dedication.—In *Brunswick & W. R. Co. v. City of Waycross* (Ga., April 17, 1893.), 17 S. E. Rep. 674, it was held that where the dedication of so much of a public street as crosses an existing track and the right of way of a railroad company has resulted by implication from the laying out of the street at that point by the municipal authorities and its use by the public, acquiesced in by the railroad company, the company is not thereby precluded from constructing and using for the passage of its locomotives and cars, when essential to the convenient transaction of its business, an additional track upon such street, within the limits of the right of way owned by it at the time of the dedication, if the track is so constructed and used as not to interfere more with the use of the street by the public than is ordinary and usual at street and railway intersections, where the whole breadth of the right of way is occupied with tracks for the passage of locomotives and cars. "A vital element of dedication is the intent—the *animus dedicandi*; and where the dedication results from mere use and acquiescence it is not to be inferred that the donor parted with more than such use necessitates. He may con-

tinue afterward to use the property for any purpose not inconsistent with the use to which it is dedicated. Washb. Easem. 187. Here there was a qualified dedication of an easement to cross the track and right of way of the railroad company. It was qualified by the right of the company to continue the use of its right of way for the passage of its locomotives and cars. Did the dedication restrict this use to their passage on the one track then existing, or did the right continue as to the whole of the right of way owned by the company at that time, and which extended 100 feet from the centre of the track on each side? It is not denied that up to the time of the dedication the company had the right to construct within this space as many additional tracks as its business might require. The right to build side-tracks and switches was incident to the use then existing. Before the company can be held to have abandoned this right, and to have excluded itself from any part of the right of way than that covered by the existing track, the intent must have been manifest, clear, and unequivocal; and certainly no such intent is established by mere acquiescence in the use of the street by the public, if that use is not necessarily inconsistent with the extension of the railroad use. It is plain that these uses are not necessarily inconsistent. The exercise of the railroad use upon two tracks is not less consistent with the character of the *locus in quo* as a street than its exercise upon one. The public, after the extension, can continue as before to use the street at that point, and the public authorities can continue their control over it, and in the exercise of the police power can so regulate the manner of constructing and using the track as to reduce the danger and inconvenience to the public to the least degree practicable where such a use exists. They may require the railroad company to provide safe crossings, to give warning of the approach of its locomotives and cars, and to reduce the speed within prescribed limits while crossing the street, and may prevent it from obstructing the street with standing cars beyond a reasonable time. In the case of *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, in which the city sought to prevent the railroad company from laying additional track in a street which had been dedicated to the public subject to the right of the railroad company to build and operate its road therein, it was held that the company had not lost its right to lay the additional track, although more than 20 years had elapsed since the main track was laid; and it was said by ELLIOTT, C.J., whose text-book on *Roads and Streets* is a leading authority on the subject: 'The occupancy of a highway by a railroad does not destroy its character. It remains a highway notwithstanding its use by the railroad company. * * * The control of the highway is not taken from the municipality, for it may still exercise the police power over it. The only limitation is that which grows out of the right to use it for railroad purposes. Use of a highway for a railroad is a public use, and is not necessarily destructive of the character of the public way. The authorities which deny the right to annex a condition to a dedication incompatible with its character and use are not of controlling force when the annexed condition is that a railroad company may also use the highway.' As, therefore, the public and the railroad company could occupy jointly, for their respective uses, the whole of the right of way, as well as the part covered by the existing track, the occupancy by the public is not to be treated as excluding that of the railroad company from any part of the premises."

Double Use of Railroad Tracks—Ordinance Limitations.—In *Chicago, St. Paul & K. C. R. Co. v. Kansas City, St. J. & B. R. Co.*, 152 Fed. Rep. 178, it was held that a city ordinance giving a railroad company a right of way on condition that other railroad companies be permitted to use its tracks within the city did not bind the company to allow other roads to use its

tracks laid after the ordinance went into effect, beyond the right of way granted by the said ordinance.

Railroad Dedicating Street across its Right of Way.—In *Northern Pacific R. Co. v. City of Spokane*, 56 Fed. Rep. 915, it was held that the dedication of streets intersecting the right of way of the Union Pacific R. Co., was not *ultra vires* as being an alienation of its right of way so as to interfere with the purpose of the grant made by Congress; also, that the company could not be allowed, so long as it had facilities for handling its business conveniently, to maintain a station across the dedicated street on the ground that by thus having room near the business centre of the city it would acquire a decided advantage over competing roads. The court said: "I assent to the proposition that the corporation cannot lawfully dispose of its right of way granted by Congress, so as to defeat the purpose of Congress in making the grant. But certainly the railroad was intended to be a public benefit and aid to the development of the country, and not to be a barrier. It was contemplated that towns and cities would grow up along its line, and that the coming and going of people to and from the company's depots and stations, and the transaction of business there, would necessitate the location of streets crossing the right of way. The grant is sufficiently liberal to admit of such crossings without crippling the railroad or impairing its usefulness. I think that the dedication of the streets in railroad addition cannot be held to be *ultra vires*, consistently with a reasonable construction of the act creating the Northern Pacific Railroad Company. Its officers have not so construed the franchise in transacting the company's land business. When the plat was made, Spokane was but a prospective city, and energetic people have since made it an actual city, covering a large territory on both sides of Railroad street. To now cut the city in twain by decreeing that the right of way is, in contemplation of law, a wall without gates or passageways, would be the perpetration of a monstrous wrong. The necessities of the company do not require this. A new freight depot has been erected since this suit was commenced upon a site as near to the heart of the city as a railroad freight depot ought to be located. The only pretext for insisting upon closing Mill street by extending a freight depot across it is that by having room so near to the business centre for trains to stand without being divided the company will hold a position of decided advantage over its competitors for the traffic of Spokane. A freight depot and yard situated so as to obstruct the shortest and most natural routes between the principal residence district and the retail stores, office-buildings, and hotels of the city must necessarily be a source of annoyance to many people. It is true, therefore, that no other railroad can be expected to ever secure such a location for such use, and the Northern Pacific Railroad Company, if permitted to have its way in this matter, would indeed be alone in the enjoyment of whatever advantage there may be in holding such a location; but, so long as the company has facilities for handling its traffic conveniently, this plea merits no consideration."

CITY OF SEATTLE

v.

COLUMBUS & PUGET SOUND R. Co.

(Washington Supreme Court, May 24, 1893.)

Railroad in Street—Grant of Right of Way—Estoppel of City to Deny Validity of Ordinances.—Where the charter of a city, granted by the territorial legislature, empowered the city to lay out, establish, and extend streets, etc., and establish the grades thereof, conferring the power to build, construct, and regulate wharves, piers, and landing places at the foot of any street, and to authorize or forbid the location and laying-down of tracks for railroads and street railways, on any and all streets and alleys and public places within the city, and the statutes empower railroads to acquire rights of way in any part of any public road, street or alley, or public grounds,—the city, after having granted to a railroad company a franchise to occupy certain streets, was estopped from denying the validity of its own acts in granting such franchise, after the provisions of its ordinance making the grant had been expressly confirmed by the new state constitution; and the fact that the right of way granted to the said railroad company was through streets located upon tide-lands, did not affect the validity of the ordinance by reason of the title thereto being held in trust for the future state.

Same—Grant not Revocable Arbitrarily.—Where the said ordinance granted to any company which should first construct a railroad the right to lay a track upon the right of way in question, a railroad company which had constructed its road thereon, could not be deprived of its franchises by the arbitrary action of the city, notwithstanding it had failed to complete its line within the time specified in the ordinance, and had neglected to operate its road for a year and a half, where the road was subsequently kept in operation continuously for several years prior to the institution of this suit, and where the city had previously taken no step to compel the company to remove its tracks from the streets in question.

Interference with Right of Way—Grading Street.—A city, under its power to improve and grade its streets, cannot arbitrarily exercise its powers to the extent of working a destruction of a railroad franchise previously granted, by raising the grade of a street-crossing to such a height as to absolutely prevent the railroad company from maintaining its road across such street; and the fact that the railroad company's line at such crossing had been destroyed by fire would not affect the respective rights of the parties.

Same—Irrevocable Grant.—Property rights acquired by a railroad company by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant, and, there being no such limitation in this instance, the rights granted to the railroad company by the said ordinance are irrevocable, excepting in so far as they may be affected under the exercise of the power of eminent domain upon making compensation.

George Donworth (Burke, Shepard & Woods, of counsel), for appellant.

Ashton & Chapman and Andrew F. Burleigh, for respondents.

SCOTT, J.—On the 14th day of March, 1882, the city of Seattle passed an ordinance purporting to grant a right of way to the Oregon & Transcontinental Railroad Company and the Columbia & Puget Sound Railroad Company to lay a single or double track along and upon certain streets therein described.

Case stated—
Ordinance.

The first section, describing the route, was amended October 29, 1883. The second section, omitting the seventh subdivision, which provided for the joint use of such tracks by any other railroad company constructing a railroad to Seattle, and provided a method of determining compensation therefor, is as follows: "That said Oregon & Transcontinental Railroad Company and the Columbia & Puget Sound Railroad Company be and are authorized to locate, lay down, and perpetually maintain and operate a single or double track railroad upon the track and place described in section one of this ordinance, upon the following terms, to wit: First. That the said companies, their successors and assigns, are to allow each wharf-owner a side-track connecting the said road with the warehouses of each wharf-owner, the side-track to be constructed and kept in repair by the wharf-owners or occupants along said water-front. Second. That the right so granted shall not in any way be construed as depriving the occupants of lots along said water-front of any riparian rights or any rights, except so far as such way extends. The said owners and occupants reserve the right to wharf out in front of said railroad, and it is agreed that they shall have that right without objection by, or on the part of, said railroad companies, their successors or assigns. Third. The said road to be constructed by the railroad companies so as to be on a common level with wharves along said water-front. Fourth. That said companies, their successors and assigns, where said track crosses a wharf now or hereafter to be constructed, shall plank and keep in repair at least fifteen feet of said way, and, whenever a double track is constructed over said way, then the company or companies constructing or operating the same shall plank and keep in repair the entire way over said wharves, and the same may be used by the wharf-owners at all times except when trains are passing over it. Fifth. That said railroad companies, their successors and assigns, shall not allow their cars to stand upon the track on any wharf along said water-front without the consent of the owner of such wharf. Sixth. That said Oregon & Transcontinental Railroad Company is to construct a standard-gauge railroad from Seattle to a point on the Northern Pacific Railroad Company's constructed line, so as to connect the city of Seattle with eastern Washington, either by way of Portland, Oregon, or the Cascade Mountains,

within two (2) years; and, on failure so to do, this right herein granted shall be void, and of no effect: provided, that, if any other road shall construct a standard-gauge road connecting Seattle with eastern Washington before the roads above mentioned, then and in such case the rights herein to lay, maintain, and operate such tracks be, and the same are hereby, granted to the road that shall so construct such line."

"Eighth. That said companies, their successors or assigns, shall not run trains over said tracks along said water-front at a higher rate of speed than six miles an hour, and the city shall retain the same control over the streets and alleys wherein the said tracks are laid on and across streets and alleys upon the land."

In the latter part of 1883, the Puget Sound Shore Railroad Company, which was the predecessor of the Northern Pacific & Puget Sound Shore Railroad Company, and which claimed to have succeeded to the rights of the Oregon & Transcontinental Railroad Company, aforesaid, constructed a railroad of standard gauge from Seattle to Stuck Junction, a point on the Northern Pacific Railroad Company's line, thereby connecting the city of Seattle with eastern Washington, then via Portland, Oreg., with a continuous line of railroad. This road was constructed within the time specified. It started from a point within the southern limits of said city of Seattle, but did not cover any part of the right of way described in said ordinance. This road was operated for about one month after completion, but thenceforth for a year and a half no trains were run thereover. A three-rail track (the Columbia & Puget Sound Railroad being a narrow-gauge road) was also constructed by the Columbia & Puget Sound Railroad Company and the Puget Sound Shore Railroad Company along the right of way described in said ordinance, which is now in controversy, but a gap of one rail's length was left at the point where the standard-gauge track was designed to connect with the line constructed as aforesaid. After the expiration of this period of one year and a half, during which the road aforesaid was not operated, the connection was made, and a continuous line was thenceforth operated continuously for several years, until June 6, 1889, when a great fire destroyed the railroad on said right of way, together with a vast amount of other property in the vicinity. The railroad companies at once set about restoring the wharves and warehouses, etc., and the railroad tracks on said right of way. When they reached Columbia street, building north, they found that the city had raised the grade of that street at the point of crossing about two feet, and had filled in the street to conform therewith. On August 21, 1889,

when the railroad companies were proceeding to build across the street on the wharf-level grade as before, and were cutting the embankment the city had placed in front of them, this action was commenced, and a temporary restraining order was issued and served, restraining them from prosecuting the reconstruction of their tracks across Columbia street. Various attempts were made to dissolve this order, but without success, so that the respondents have not been able to reconstruct said tracks north of the south line of Columbia street by reason of these proceedings. Upon the final trial, the court below decided the cause in favor of the defendants, but ordered that the respondents should gain no advantage of the decision, provided the city should within 30 days prosecute an appeal, which it has done. Therefore all matters remain in *statu quo*, as of August 21, 1889.

The right of way in controversy is located upon tide and shore lands, a part of it being within the meander-line, and a part without. The first five propositions contended for by appellant relate to the right of the city to maintain and control a public street on the shore land prior to the erection of the territory of Washington into a state, to extend the streets in question thereon, and to the enactment of the ordinance establishing the higher grade of Columbia street after the destruction of the railroad at such point by fire as aforesaid. For the purposes of this case, these propositions will be taken as established. The remaining points contended for by appellant are as follows: "(6) Ordinance No. 262 (as amended by Ordinance No. 484), purporting to grant a franchise to build and operate a railroad, is void, by reason of the non-existence of the Oregon & Transcontinental Railroad Company, one of the grantees named—First, in respect to the defendant Columbia & Puget Sound Railroad Company, the other grantee; and also, second, in respect to the defendant Puget Sound Shore Railroad Company, which joined with the last-named grantee in building the road; and, third, in respect to said defendants jointly; and, fourth, said franchise was also void because in terms perpetual and irrevocable. (7) Said ordinance is void by reason of non-compliance with the sixth condition therein specified, as to the time within which the road should be constructed to a connection with eastern Washington and by reason of failure continuously to operate the road when constructed. (8) Said ordinance was of no force in respect to the shore land, comprising the place to which the injunction sought relates, because the city, at the date of the ordinance, had no power to dispose of or incumber the shore; and the city is not estopped, by its subsequently acquired title to the *locus in quo* as a street, from denying its

former power to make the grant. (9) Assuming, however, that the defendants have the franchise claimed under the ordinance, the city's right of control over the street at the point of crossing was paramount, and could be exercised, when the injunction was sought, as the city might see fit, though the result might be the impairment or even destruction of the defendants' franchise; the sole remedy of the defendants, if any, being an action for damages. (10) Even if the city's right of control over the street could not be exercised to the destruction of the defendants' franchise, its exercise in this case would not work a destruction of the franchise, apart from the change of grade of other streets crossing the railroad; and such change of other streets was not properly proved, and, if proved, was irrelevant under the pleadings."

The order in which the points have been stated will not be followed in the discussion, but the proposition in relation to

the want of authority in the city to grant the right of way in question, stated in its eighth ground, will be first noticed. The right to authorize railroad companies to lay their tracks upon the streets and public places in the city generally was expressly conferred by law. Section 11 of the charter of the city of Seattle in force at the time, to be found at the page 243 of the Session Laws of 1885-86, is as follows: "The city of Seattle has power to provide for the survey of the blocks and streets of the city, and for making and establishing the boundary-lines of such blocks and streets, and to establish the grades of all streets within the city, and to lay off, widen, straighten, narrow, change, extend, vacate, and establish streets, highways, alleys, and all public grounds, and to provide for the condemnation of such real estate as may be necessary for such purposes, and to levy and collect assessments upon all property benefited by the change or improvement, authorized by this section, sufficient to make compensation for all property condemned or damaged, and to authorize or forbid the location and laying-down of tracks for railways and street railways on any and all streets and alleys and public places within the city; provided, that no street or alley shall be extended or vacated except by a vote of six members of the council in favor thereof; and provided, further, that any person or corporation laying down such railway shall be liable to the owners of property abutting upon such streets, alley, or alleys for all damages or injury caused thereby, to be ascertained on the petition of the property-owners, in the manner provided by chapter 188, sections 2473-2576 inclusive, of the Code of Washington of 1881; and the judgment and decree thereon shall be that the company or per-

Estoppel of city to deny validity of ordinance.

sons shall pay such damages, and on such payment shall be entitled to such right of way, and, if no petition for such compensation shall be filed within two years after the track is so laid, such claim shall be barred." There are several sections contained in the Code of 1881 also relating to this subject-matter, which are as follows: "Sec. 2458. When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used and occupied by such corporation, and, if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of said road. Sec. 2459. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town, as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time, when requested, such corporation may make such appropriation without reference thereto." These are now sections 1574 and 1575, vol. 1, of the present Code.

While it is admitted that the city had the right generally to allow railroad companies to lay tracks upon its streets, it is contended that it had no such right where such streets were located upon tide-lands, because the title thereto was in the territory in trust for the future state, and, therefore, that the city could not burden the same with any easement. It is contended, however, that the city had the right to occupy such lands for street purposes, and, although we have taken this contention as established, it may be well to notice some of the provisions of the city charter relating thereto. Section 11, as we have seen, confers power to lay off, establish, and extend streets, etc., and establish the grade thereof. Section 26 confers power to build, construct, and regulate wharves, piers, and landing-places at the foot of any street terminating at the shore of Elliott bay, and to regulate and prescribe the limits of the extension of wharves into the waters of any harbors within the city limits. And section 1 defines the

limits of the city as extending on the westward to the centre of Elliott bay.

Thus it will be seen that the city had as full and complete rights in the premises as could have been granted by the territorial legislature, and this grant was valid and binding, excepting as against the future state, and until it should take some steps to annul such action, subject, of course, to such restraints as should be imposed by the general government in its control of such waters. The city's exercise of the power so granted by the territorial legislature was never interfered with in the premises, but its acts thereunder have been expressly confirmed by virtue of the grant of power in section 3, art. 15, of the state constitution, authorizing the city to extend its streets over intervening tide lands to the harbor area there provided for. We know of no reason why the city could not authorize the laying of railway tracks upon streets located upon tide and shore lands. We see nothing in the way of its granting whatever rights it did have in the premises. The very right to occupy shore and tide lands for street purposes would carry with it during such time at least the full enjoyment of all privileges that the city exercised with regard to its other streets, and one of these was the right to authorize the location of railway tracks upon its streets. This seems to us to have been as much within the policy of the law as was the recognition of the right to use such lands for street purposes in any wise. The city undertook to, and did, as far as it was able, confer this privilege on the respondents. Its acts have never been in any wise questioned, excepting in this instance, where it undertakes to set up its own want of power. But it sought to exercise the power, and its right so to do was not interfered with by any higher authority, but, on the contrary, was subsequently confirmed; and we are of the opinion that the city is in no position to urge the invalidity of the franchise, or its want of power to grant the same, under the circumstances; nor can it arbitrarily repeal the same, whatever rights it may have in the exercise of the power of eminent domain.

We are also of the opinion that the city is not in a position to urge that the ordinance is void by reason of a non-compliance with the sixth condition as to the time within which the railroad should be constructed, nor of the failure to continuously operate the road when constructed. The essential object of the ordinance was to secure continuous railway connection with the eastern part of the state, and for that purpose the ordinance, by a proviso in said condition purported to confer or convey the right to lay a track upon the right of way in question to any

Grant not revocable.

company which should first construct a standard-gauge railroad affording such connection. There was no intention to limit the privileges authorized to the particular corporations named, and while it is admitted that the road was not constructed from the point in controversy within the time specified, and that for a year and a half from about a month after its completion it was not operated, and thus, as appellant contends, the spirit of the ordinance was violated; yet, notwithstanding this, the ordinance was not repealed, nor was any step taken during said time to compel the railroad companies to remove their tracks from the streets in question, but they were allowed to remain there, and finally the line was put in operation, and was operated continuously for several years prior to the institution of this suit. The respondents' rights in the premises were in no wise questioned during said times, and, conceding that the city had the right to impose the time-limitation condition, we are of the opinion that it is now, and was at the time of the institution of this suit, estopped from availing itself of the same under the circumstances.

It seems to us that the contention of the respondents is well founded that the ordinance in question, while it remained upon the books as one of the ordinances of said city, had the effect of designating the route where the line of railway might be constructed by any company choosing to build a standard-gauge road thereon connecting said city by rail with eastern Washington, and that, by constructing its line of railway thereon, respondents acquired a right as against the city to use such streets for such purpose, subject, of course, to the reasonable control and regulation of the municipal authorities.

As to the sixth proposition: The point that there was no such corporation in existence as the Oregon & Transcontinental Railroad Company seems to us immaterial. It does appear that there was a corporation known as the "Oregon Transcontinental Company," and we think it fairly appears from the proof that this was the corporation that was intended to be designated, instead of the "Oregon & Transcontinental Railroad Company," which had no existence, and that it was, in effect, simply a misnomer; but, under the view we have taken of the points heretofore discussed, this matter becomes unimportant. The point in relation to the franchise being void, because in terms perpetual and irrevocable, will be further noticed. What has been said disposes of the sixth, seventh, and eighth propositions otherwise.

Many of appellant's statements advanced in support of its ninth ground are unquestionably sound, but they fail to sustain

the position taken. A city's power to improve and graduate its streets is undoubtedly a continuant power, not exhausted by its first exercise, and inalienable by the corporate authorities, and such authorities are the ones to judge of the expediency or necessity of its exercise. This is well sustained by the cases cited. But the next statement, that under this power the city's right to establish and execute a new and higher grade of Columbia street at the place in dispute follows as a matter of course, must be taken with some degree of limitation. It will aid in the discussion of this question to state our views here of the effect of the city's action in the premises. The raising of the grade of the railway tracks two feet at the point in question would greatly impair the usefulness of the tracks. This clearly appears from the proof, and it also appears that at the same time the city raised the grades of other streets in the vicinity which were crossed by the railroad tracks aforesaid to such an extent as to make it impossible for the railroad companies to reconstruct their tracks upon said right of way. The effect of the raising of the grades of these various streets was such as to absolutely destroy the franchise, let alone making it impossible for the railroad companies to comply with the ordinance in question, in giving to each wharf-owner a side-track, and to construct the tracks on a common level with the wharves along the water-front.

Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It cannot be exercised to the extent of working a destruction of such a franchise previously granted. This would amount to an unauthorized taking of property; and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistent with the preservation of rights previously acquired by others; as in the case of *State v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71, which involved the validity of an ordinance requiring a horse railway to make its tracks previously laid conform to the grade of the street, in which case it is said that "the provisions of these ordinances requiring the tracks to conform to grade, and to be laid under the direction of the street commissioner, * * *

Interference
with right of
way—Grading
street.

are of the character of regulations which may be adopted, and, if reasonable, are valid. Such regulations do not appreciably interfere with the exercise of its franchise by a corporation having a franchise to use the public streets for its business; * * * and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the use of the streets, for the purposes of a street railway, and for ordinary travel."

Nor can we agree with the statement that there was in this case no taking of property by the alteration of such grades because, at the particular time the ordinances were passed, the railroad tracks had been destroyed by fire at the point in question, and for that reason there was no property there in existence to take. The argument might apply with some force in case of the destruction of a structure which could be rebuilt as well to conform to one grade as another, and where there would only be a damaging instead of a deprivation of the right. But the railroad tracks at this point must be rebuilt with reference to the established grade of the railroads of which they were a part. The part which merely crossed the street could not be segregated and looked at independently, for it was of no value, excepting as a part of the system, and could only be reconstructed practically upon the same grade as before; and this, as we have seen, was rendered impossible by the changes in the grades of the streets made as aforesaid. Although the railway tracks across this street were destroyed by fire, the property of the companies still remained. The property was the franchise—the right to use the street for the purpose of constructing and operating tracks thereon. This was the material thing of value, and this was what was sought to be taken by the corporate authorities in the manner aforesaid, and it was just as much of a taking as though the tracks had been actually in existence at the time the ordinances were adopted. The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the welfare and prosperity of the people, and, because of their capacity for usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulation of matters within the municipal limits; but, when a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not

have the effect of destroying or even materially injuring such rights. The city must so use its powers as to enable the respondents to have a reasonable use and enjoyment of theirs, and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads. 1 Rorer, R. R. p. 553, par. 13.

Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which at the same time affords protection to the rights of the respondents. *State v. Noyes*, 47 Me. 189; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 86 Am. & Eng. R. Cas. 171.

The substance of the tenth point has been previously disposed of in the view taken that the acts of the city, if sustained, would work a destruction of the franchise. Minor points as to whether the proof was irrelevant under the pleadings are of no particular importance at this time. Where a full and fair trial has been had upon the merits, and this is apparent, little attention will be paid in an equity cause to technical points raised over the pleadings.

The judgment of the lower court is affirmed.

DUNBAR, C.J., and HOYT, STILES, and ANDERS, JJ., concur.

Powers of Municipalities as to Railroads in Streets.—See notes, 15 Am. & Eng. R. Cas. 402; 14 *Id.* 109; 13 *Id.* 637.

Railroads in Streets—Number of Trains to be Operated—Restriction by Court.—In *Kentucky & I. B. Co. v. Kreiger* (Ky., May 28, 1892.), 19 S. W. Rep. 738, it was held that where a railroad company is authorized to construct and operate a railroad track in a street, a court cannot restrict the company as to the number of trains to be operated, as a condition precedent to the construction of the track. The court said: "The main question is whether the chancellor properly restricted appellant in respect to the number of freight trains that may pass in front of appellee's property during business hours of each day. As early as the case of *Railroad Co. v. Applegate*, 8 Dana, 289, a railroad operated by steam-power within a city

was recognized as entirely consistent with the purposes for which a street may be properly used, and, when authorized by municipal power conferred by the legislature, it is not an encroachment upon the public property or individual rights, because neither the local public nor proprietor of an abutting lot has any right or property in a street, or any other legal interest in it than that which is common to all the people. And such may be now considered the settled doctrine of this state, having been often and uniformly affirmed and applied since that case was decided. In fact the judgment of the lower court permitting appellant to lay down a single track and operate its road upon Portland avenue amounts to a distinct recognition of the doctrine, and could not be upheld otherwise. As, then, both state and municipal authority was given to appellant to construct and operate its road upon Portland avenue, and the judgment necessarily and logically involved right of appellant to occupy and use the street jointly and in common with others, arbitrary restrictions or conditions of the exercise of such right cannot be justified; but restrictions must be imposed, if at all, only for the purpose and to the extent of preventing the exclusion or unreasonable hindrance of others from the proper use or enjoyment of the street who have an equal right to such use and enjoyment. The right of appellant to occupy and use the street for transaction of its particular business being conceded, there would seem to be no more power in a court to arbitrarily prescribe the precise number of freight trains it may move over its track during the business hours of a day than to fix upon the number of wagons appellee may have driven from Duncan street through his building onto and across Portland avenue, during the same period. No other lot-owner on Portland avenue between Fourteenth and Fifteenth streets besides appellee Kreiger has sought to prevent construction or to restrict operation of appellant's road, and consequently the effect of limiting the number of trains is simply to defer to what the evidence in this case shows to be altogether unreasonable and useless exaction on the part of appellee. Unquestionably there would be a remedy against an unreasonable obstruction or hindrance of others using the street for their business by reason of too frequent passage of trains; but, as a state of case has not been shown by this record making a restriction upon appellant as to the number of cars it may move over its track necessary or proper, we think the judgment was in that respect erroneous. Whenever appellee or any other person has been hindered or obstructed by the unreasonable use by appellant of its road, the remedy may be afforded if applied for, but a restriction or hard condition cannot be justly put upon the business of appellant in anticipation of a wrong or injury to appellee that may never occur. While, therefore, a railroad company may be enjoined from purposely stopping, switching, or making up trains on a public street, which is not legitimate use of the street, and besides unnecessarily and improperly obstructs the business and endangers personal safety of others, a court has no power to prescribe as a condition precedent of the occupation and use of a public street by a railroad company the number of freight trains that may pass over its road, for that would be an unreasonable obstruction of its business; nor in any case to control its business in that respect except when frequent passage of trains operates to exclude others from use of the street, or unreasonably obstructs them in its use."

HARVEY

v.

GEORGIA SOUTHERN & FLORIDA R. CO. *et al.*

(90 Georgia, 66.)

Railroad in Street—Obstruction—Special Damage—Abutting Owner.—The owner of a business-stand abutting upon a public alley sustains special damage—that is, damage not shared in by the public at large—if, by the illegal obstruction of the alley, customers are prevented from having and using the same as a means of access to the stand, for the purposes of trade, as they have been habitually doing for many years previously.

Same—Defence to Action for Damages—Prospective Advantage to Abutting Owner.—It is no answer to this grievance by a railroad company unlawfully obstructing the alley that new and increased custom will result to the plaintiff's business by reason of the obstruction itself (the same being a depot to be placed across the alley), and other improvements which will be erected by the company at and near the point where the depot is to be located and maintained; nor can any increase in the value of the plaintiff's property, anticipated as a probable effect of the company's new improvements and works, be taken into the account as a set-off against injury to business. Wood, Nuis. § 864, p. 894.

Same—Nuisance—Instructions to Jury.—The court erred in charging the jury in conflict with the principles above announced; the company having admitted at the trial that it claimed no authority of law for closing the alley, and that closing the same was a nuisance.

ERROR from Bibb superior court.

The following is the official report:

The petition of Harvey *et al.*, owners of a store and dwelling-houses at the corner of Fourth street and a 20-foot alley, prayed for injunction against the obstruction by the defendant corporations of the alley, where it divides two city lots owned by them, these two lots being between Fifth street and the lot in which is situated the property of the plaintiffs. A temporary injunction was granted, with allowance to the defendants to lay railroad tracks across the alley, and the judgment was affirmed. 84 Ga. 372, 10 S. E. Rep. 971. The petition contained a prayer for money damages for the time the alley had been kept closed by the defendants; and, when the case came on for trial before a jury, this prayer was stricken by amendment, leaving only the prayer for permanent injunction. The defendants' counsel admitted that they had no authority of law for closing the alley, and that closing it was a nuisance; but they claimed that the plaintiffs suffered no such special damage as entitled them to the injunction asked for. After the

introduction of evidence, the court submitted to the jury to find whether the closing of the alley, as proposed by the defendants, would cause special damage to the business and property, or business or property, of the plaintiffs. The jury found it would not, and the court entered a decree denying the permanent injunction. To this decree, and to the overruling of a motion for a new trial, the plaintiffs excepted.

The petition alleged that, when the plaintiffs purchased their property, they purchased an easement in the alley, and have occupied and used it in conjunction with other citizens for years, paying a good round price for it; for, when the property was purchased, many hundred dollars more were paid for it than adjoining property of the same size could be bought for, on account of this alley privilege, which made their property especially valuable, owing to the open thoroughfare, which is the direct line of travel for a large number of customers who had been in the habit of trading in the store, etc., and who live on Fifth street and other parts of the city east of their property; that the vast bulk of the trade of the store, which goes to the support of the petitioners, and renders their property valuable, comes from the vast number of people who have homes east of it on Fifth street and adjoining alleys, who have for years been in the habit of using this alley as a thoroughfare to the store, and that from this source and from this cross-street great volumes of trade have for years come to their property, so that, for a small stand, there is no more valuable business property in the city, but that if this cross-street is permitted to be closed the vast bulk of trade will be cut off from the storehouse, their natural ingress to and egress from the same being destroyed, and the same will be driven to other stores, and the value of their property thus greatly and permanently injured.

The defendants' answer alleged that the plaintiffs' lot has no peculiar value on account of being located on the alley; that every lot as originally laid out in the city had an alley appurtenant to it; that the plaintiffs have no easement or interest in the alley; that it has been closed for years, on the opposite side of Fifth street from defendants' property, by the Central Railroad, and many similar alleys elsewhere in the city have been allowed to be closed by the abutting property-owners; that defendants' business demands depot-buildings of such length as to extend across the alley, and it is impossible to build a depot on either of the two lots alone; and that the proposed occupation of the alley will not in any manner affect the value of plaintiffs' property, but on the contrary all property in that portion of the city has increased in value since it has become generally known that defendants

intended to locate their offices and depots there, and plaintiffs' property is to-day worth more by reason of the contemplated location of defendants' depot than it was before said property was purchased by defendants, for this reason.

The motion for a new trial contains 27 grounds. Besides those alleging that the verdict was contrary to law and evidence,

the following rulings are assigned as errors: (4) Refusal of plaintiffs' motion to make the injunction perpetual on the ground sustained by the supreme court on the temporary injunction. (5, 6, 9-13) Refusals to charge as follows: "If you be-

lieve from the evidence that any damage will result to plaintiffs by reason of the closing of any portion of this alley; that the usual and natural approaches to the plaintiffs property from any direction will be impaired, or in the slightest manner interfered with—you are to say so in your verdict. I charge you that, if plaintiffs have an easement in the alley, such easement is property, and that no property can be taken or damaged in Georgia without just and adequate compensation being first paid." "I charge you that if you believe plaintiffs bought their property with this alley running on one side of same, and running to Fifth street, and have used and enjoyed the same for a term of years, that they own and acquire an easement in said alley, which easement is property, and cannot in any way be interfered with, without authority in law. I charge you that if you believe from the evidence that this alley, running from Fourth to Fifth street, was and is a public thoroughfare, existing for years, that the Georgia Southern & Florida Railroad had no right to close any portion of the same without express legislative authority. I charge you that the legislative act giving the Georgia Southern & Florida Railroad authority to take an encroachment in front of its property on Fifth street gave it no right to close this alley. I charge you that no one has any right to close or obstruct any public alley or street, or any portion thereof, without express authority from the legislature. I charge you that neither the railroad nor the construction company had any authority, in law, to close any portions of this alley." (14) Failure to charge, as requested in argument of counsel, but not in writing, that the entire obstruction or closing of an alley or street would deprive plaintiffs of rights therein; that the entire closing of an alley or street differs from the use or occupation of a street by a railroad, where there is enough of said street or alley left as a highway for the use of the public; and that, if the railroad was using said alley so as it would be inconsistent with the continued use of the street or alley

Assignments of error.

as an open public street, it would be a use essentially inconsistent with that of a public street, and hence illegal. (15) Failure to charge that an unreasonable, excessive, or exclusive use, or such use as not to leave passage of the street, should be enjoined, and the adjoining owner would be entitled to recover damages sustained by his being deprived of a means of access to his land. (16) Refusal to submit to the jury the following questions, prepared in writing: "*First.* Did complainants, the Harveys, have an easement into this alley, running through this block 57 into Fifth street? *Second.* Did the Georgia Southern & Florida Railroad Company, or any one for it, ever close any portion of the alley in question, running from Fourth to Fifth street, which alley in part adjoins the Harvey property? If so, was the Harveys' easement interfered with, and was their property damaged? *Third.* If the lower portion of this alley was closed, would the Harvey property be in any manner injured, and would any of the avenues of approach to said property be interfered with or obstructed? *Fourth.* Did the Harveys, the complainants, ever consent to the closing or obstructing of any portion of said alley." (21) Error in not charging upon the legality of closing the alley. The plaintiff having so requested, the court said: "They have nothing to do with that. It is a question for me"—this answer being misleading to the jury, and virtually withdrawing from their consideration all right that plaintiffs might have had in the easement of the alley. (22) Error in the charge as a whole, in that it excluded from the consideration of the jury the right of Mrs. Harvey in the alley, and of the damage that would arise from the interference with her easement in the same, and in that it did not submit the question as to the illegality of the closing of the alley, but discussed the question as if the alley could lawfully be closed.

(7, 8) Refusals to charge: "I charge you that against actual, special damages, proven to exist if this alley is closed, you can set off only actual and special advantages. You cannot set off speculative advantages, or advantages which would be general in their nature, in arriving at a decision whether this property would be specially damaged. If the closing of the alley would be illegal, no benefits which might flow from the illegal act can be set off against the damages which would accrue to the property by reason of such closing."

(17-20, 27) Erroneous instructions: "If you find, however, that there is a special damage done to that property or business, then you can inquire, on the Enhanced value—Set-off. other hand, whether the effect of the railroad closing the alley, by building a depot there, would be to enhance the value of that property, and increase it, and in-

crease the value of the business; and, if you find from the proof that the enhanced value was equal to or greater than the damage done to the business, then you would still find for the defendants." Error, because the matter complained of was not the building of a depot, but the closing of the alley, and if under this charge the jury might set off the enhancement arising from the depot, if her property was damaged by the closing of the alley, it was immaterial whether by a depot or a fence; because the charge allows the enhancement arising from a depot, and assumes that one will be built, and the question of damage is [to] be offset by the enhancement from said depot, when one may not be built; and because the pleadings do not authorize the same. "If, however, you find there was a damage done to the property, and at the same time an enhanced value, created by these railroad improvements there, but that the damage done to this property and business was greater than the improvements, you would find for Mrs. Harvey or trustee in the case." Error, because misleading, in allowing enhanced value to be set off against actual damage. "If you find there is any especial damage to her, you go and inquire as to the effect of these improvements, these depot-buildings, and as to the effect that would have on the value of that property and business. If you find—and you ought to look at all that, look into the nature of the proposed improvements that would close up this alley, the probable improvements that would be put there, the number of men that would be employed there, the traffic that would create—all those things you ought to consider, in deciding whether or not these improvements by the railroad company would enhance the value of this property, and then you look into the question, and decide according to the truth of it, as you find it from the evidence. If the property will be damaged by the closing of this alley, and at the same time its value will be enhanced by the improvements put there, the value of the property and business will be increased, and the enhancement was greater than the damage, you would, of course, find there was no special damages done." Error, because the charge assumes that a traffic would be created by improvements, and is expression of opinion on that point, because it allows speculative improvements and speculative enhancement of value to set off and overcome actual damage, and is misleading to the jury in allowing the enhancement arising from any improvement to affect the actual damage; and because it is unauthorized by the pleadings. "Now if, under the instructions I have given you, you find there would be special damage, your answer to this question—and that would be your verdict—would be, simply, 'It would.' If you

find the other way, there would be no damage, or the enhanced value was greater, or would offset the damage, then your answer to it would be, 'It would not.' " Error, because misleading, it not being the law that actual damages may be diminished by the enhancement of the property, and because the pleadings do not authorize such an instruction.

" They [the railroad] further say, as to that [the closing of the alley], that the object of the railroad is to place across that alley, or that end of the alley—that twenty-foot alley—a freight and passenger depot, and let the alley terminate there at their depot, with an outlet down across ten feet wide, running down and parallel with Fourth and Fifth streets, and that the effect of placing that improvement there, will be largely to increase the value of the Harvey property, and that the effect of the business done at their depot will be to add largely to the business done by Harvey at his store, or Mrs. Harvey." Error, because no such charge is justified by the pleadings, nor was any such defence set up in the answer, and the effect of this statement in the charge was to divert the minds of the jury from the true issue upon which they should pass, and was calculated to make them consider and set off speculative advantages which they should not consider in this case, as against the actual special damages proven to flow from the nuisance complained of, and sought to be enjoined. (23-26) Error in allowing defendants, over plaintiff's objection, to ask the following questions; the first two of Mrs. Harvey, the other two of Lane and Collins: "Is not the continuation of this alley on the other side of Fifth street permanently obstructed by the Central Railroad?" the same being immaterial, for the reason that plaintiff claimed no damages by reason of the obstruction by the Central Railroad, she not claiming customers beyond the same, and for the reason that said obstruction might have been paid for or authorized by law. If the same should be illegal, two wrongs would make no right, and the former obstruction by another party could not affect the question whether this obstruction would cause damage. "What amount did you pay for the property? What did the improvements cost you?" the same not tending to illustrate the issue, and too remote in point of time to show present value. "What effect would the closing of this alley by the Georgia Southern & Florida Railroad, for the purpose for which it is to be closed, have upon Mrs. Harvey's property?" the same being matter of opinion, and allowing the witness to measure the damage, and the purpose for which it was to be closed not illustrating the issue. "The closing of that alley, what effect would it have upon the

Speculative
advantages—
Set-off.

Harvey property?" the same being illegal, for the reason just given.

F. J. Daly and Hardeman & Nottingham, for plaintiff in error.

Gustin, Guerry & Hall, for defendant in error.

PER CURIAM.—Judgment reversed.

LEAVENWORTH, NORTHERN & SOUTHERN R. Co.

v.

CURTAN *et al.*

(*Kansas Supreme Court, May 6, 1893.*)

Railroad in Street—Permanent Obstructions.—An action was brought by a lot-owner to recover damages from a railroad company for obstructing the alley at the rear of his lot, and preventing passage to and from the same. It was tried by the parties and court below upon the theory that the occupancy and obstruction were permanent and enduring. *Held*, that it will be so considered and treated in the supreme court.

Same—Easement of Abutting Owner—Special Injury.—It is not necessary that a portion of the lot should actually have been taken by the railroad company in order to entitle the owner to damages for the obstruction; but, if access to and egress from the property have been cut off by the construction of a railroad, the owner suffers a peculiar and special injury, for which he is entitled to compensation.

Same—Liability of Railroad Company for Destroying Easement of Abutting Owner.—No license or consent from the city will exempt the company from liability to the owner for placing an obstruction across the alley which practically excludes access to the lot for the ordinary purposes for which an alley is used by an owner.

Same—Extent of Injury Necessary to Support Action.—Although the obstruction may not wholly prevent access to the property, if it is such as to practically preclude the ordinary and reasonable use of the alley as a means of entering and leaving the rear of the lot, the company is liable for the injury suffered.

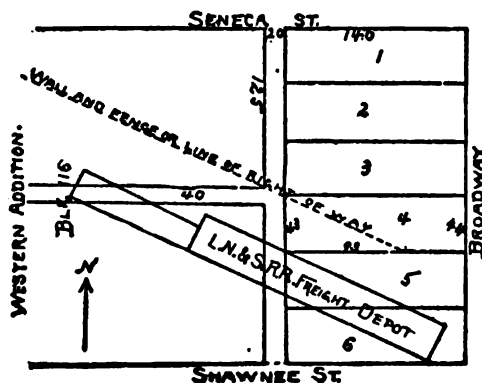
ERROR from Leavenworth district court.

Geo. R. Peck, A. A. Hurd, and *Robert Dunlap*, for plaintiff in error.

L. B. & S. E. Wheat, for defendants in error.

JOHNSTON, J.—This action was brought by Cornelius W. and Bridget E. Curtan against the railway company to recover damages suffered by reason of the permanent obstruction of two alleys in the rear of a lot owned by them, by which the ingress and egress to and from the same were prevented and destroyed. The Curtan prop-

erty which was damaged, being lot 3, is in block 116 of Leavenworth City, through which block the railway of the plaintiff in error was built in January, 1888. The lot is 44 feet wide and 140 feet deep, and is in the east part of the block, which abuts on Broadway on the east. Shawnee street lies on the south side of the block, and Seneca street bounds it on the north; and an alley, shown to be 16 feet wide, runs through the middle of the block from Seneca street to Shawnee street, passing on the rear of lot 3. From this alley, and at the rear of lots 3 and 4, another alley extends westwardly through the block to Eighth street. The course of the railway built through the block was from the southeast toward the northwest, across both of the alleys mentioned, and, besides making a deep excavation, the company, in fencing its right of way, built a high stone wall across the alley running from Seneca street to Shawnee street, and also across the alley extending westwardly. Upon the top of this wall a high fence was built, and a depot of a permanent character, which extended across both alleys, was constructed by the company, making it absolutely impossible to pass south or west through the alleys from the rear of lot 3. No part of lot 3 was appropriated by the company, but the stone wall and fence were built from the southwest corner of the lot in a northwesterly direction across the alley, leaving only an angle of the alley at the rear of the lot. The location and obstructions mentioned may be seen from the following sketch or plat, which was used as evidence in the trial of the cause:



It is alleged that the obstruction destroyed the approaches and means of access and egress to and from the rear of the lot, and deprived the owners of the benefits of the alleys in taking provisions, fuel, and other things onto the lot, whereby they were damaged in the sum of \$2000.

The railway company answered by a general denial, and, further, that it occupied the alleys with municipal consent. The trial resulted in a verdict in favor of Curtan for \$1000, and the railway company now insists that, as no part of the lot was actually taken, no damages can be recovered by reason of the obstruction; and, further, that if the alleys were occupied by it without authority, and their obstruction was a public nuisance, the owners have not by their pleadings or proof alleged or shown that which would entitle them to recover.

The case appears to have been brought and tried throughout upon the theory of a permanent occupancy and obstruction of the alleys by the railway company. The answer specifically alleges, as we have seen, the passage of an ordinance by the city authorizing the building of its road over both of the alleys, but no proof of the ordinance or the giving of municipal consent was offered. No question appears to have been raised as to the existence of such an ordinance, nor was any claim made during the trial that there was a lack of municipal consent. The plaintiff below, in asking damages and in proving the same, and also in the instructions requested, chose to consider the occupancy and obstruction as permanent or lasting, and damages were awarded upon that theory. In *Railroad Co. v. Andrews*, 26 Kan. 710, which was a similar action, it was said that "the plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots, as a *quasi* condemnation and permanent taking and appropriation of a certain interest in his property; and he can therefore recover merely for the consequent depreciation in value of his property by reason of such permanent injury, by reason of such permanent taking and appropriation, by reason of such *quasi* condemnation. He had the privilege to consider the obstruction of the alley as only a temporary injury, and to have sued for any special or temporary damage which might have occurred at any time by reason of the obstruction. But it seems that he did not choose to so consider the obstruction. He chose to consider it as permanent; and, as he has chosen to consider it as permanent, and amounting to a permanent taking and appropriation of an interest in his property, he must be governed by the rules generally governing condemnation proceedings."

Treating it in the light of a permanent appropriation, as the parties and court have done, have the land-owners suffered a loss for which they can recover? It is not necessary that a portion of the lot should actually have been taken by the company in order to entitle the owners to damages for the obstruction. In

Obstructions
to street—Per-
manent injury.

Damage re-
coverable.

this state it is well settled that if the access to and egress from property have been cut off by the construction and operation of a railroad upon the streets or alleys, the owner suffers a peculiar and special injury, for which he is entitled to compensation. *Railroad Co. v. Garside*, 10 Kan. 552; *Railroad Co. v. Twine*, 23 Kan. 585; *Railroad Co. v. Andrews*, 26 Kan. 702, 5 Am. & Eng. R. Cas. 370; *Id.*, 30 Kan. 590, 14 Am. & Eng. R. Cas. 248. Numerous decisions have been made to the effect that for the construction of a railroad upon a street or alley with authority from the city, where it was restored to its former condition, or where the structure did not deprive the owner of the reasonable use of the street or alley as a means of ingress to and egress from his lots, no recovery could be had. The fact that the street or alley may be narrowed by the structure, or made less convenient, or that by reason thereof the property would be less attractive or desirable, will create no liability against the company if the owner's special use and private right of entering and leaving his property have not been unreasonably abridged. *Heller v. Railroad Co.*, 28 Kan. 625, 7 Am. & Eng. R. Cas. 636; *Railroad Co. v. Larson*, 40 Kan. 301, 36 Am. & Eng. R. Cas. 163; *Railway Co. v. Cuykendall*, 42 Kan. 234; *Railway Co. v. Smith*, 45 Kan. 264, 46 Am. & Eng. R. Cas. 53.

While adhering to the doctrine stated in these latter cases, we are of opinion that the lot-owners in this case suffered an injury from the obstruction placed over the alleys, for which they are entitled to compensation. If we assume that the city undertook to authorize the occupancy of the alleys with the company's road, that fact would not prevent a recovery. No license or consent from the city would exempt the company from liability for placing an obstruction across the alleys which practically excluded access to the lot for the ordinary purposes for which alleys are used by a private owner. In *Railway Co. v. Fox*, 42 Kan. 494, 40 Am. & Eng. R. Cas. 331, it was said that "if the city had granted permission to lay the railroad in the street, and it had been constructed in a proper manner, so as not to impair the usefulness of the street for public travel, or to prevent access therefrom to the abutting lots, Fox would suffer no injury for which he could recover; but neither the authority nor the manner of construction can make any difference where the entire street is appropriated, and the lot-owner is cut off from all access to the street from his property. He suffers an injury not shared by the public generally when he is denied the use and enjoyment of the adjoining street, and it is immaterial whether the proper and skilful construction of the road required the appropriation of the entire street or not. The right of access

from the street to his property is an individual one, as inviolable as the property itself, of which he cannot be deprived in any way without creating a liability against the wrongdoer for the damages occasioned."

Although the obstruction in this case does not wholly prevent access to the property, it is built in such a way as to practically preclude the ordinary use of the alley as a means of entering and leaving the rear of the lot. A person can enter the alley from the east, and reach the rear of the lot; but a team and wagon cannot pass through to the west or north, as formerly, and the alley is so narrow that a team and wagon cannot be turned therein. When a person with a team and wagon loaded with material drives in, he meets an impassable barrier just at the rear of the lot, and to get out it is necessary to unhitch the team, and push the wagon out by hand, or pull it out from the rear. If the stable, coal-house, or other storeroom is built on the northwest corner of the lot, as the owner may desire, it cannot be reached at all. The obstruction angles from the corner of the lot to the other side of the alley, leaving a point or wedge-shaped piece of ground at the rear of the lot, and hence a building on the west side, at the point of the angle, could not be reached for the unloading of hay, grain, coal, or wood by any reasonable means. It thus appears that the owners are deprived of the enjoyment of the appurtenant right which they have in the alley, and suffer a loss in kind and degree differing from the public generally. The company, having encroached upon this right and obstructed the reasonable and ordinary use and enjoyment of the alley as a means of access and egress to and from the lot, is liable for the injury suffered.

Some criticism is made upon the instructions given to the jury in respect to being shut off by the obstruction from passage to other streets, but, in view of the nature of the obstruction and the testimony offered, we see nothing substantial in the objections. One objection was that the court told the jury "that plaintiffs are entitled to a verdict on the facts as they exist. Plaintiffs are not required by law to widen the alley at their expense to reduce damages or for any purpose." It is contended that a party who claims to be damaged is obliged to reduce his damages as low as possible, and that upon certain testimony that was offered it was the duty of the owners to take off a portion of the rear of their lot, in order that wagons might be turned in the alley. The rule invoked has no application here. The owners are not required to devote the rear of their lot for a highway, nor were they under any obligations to construct one from Broadway, on the front, in order to reach

Reducing
damages.

the rear. They had an appurtenant right in the alley obstructed, and the simple question to be tried was, What injury was sustained by the obstruction? The fact that the lot was accessible from a street at the other end will not prevent a recovery for the injury resulting from the obstruction at the rear. *Railway Co. v. Fox*, 42 Kan. 496, 40 Am. & Eng. R. Cas. 331.

Complaint is made that witnesses were permitted to state their conclusions as to how much the obstruction depreciated the value of the lot. Both parties were careless in the examination of witnesses in this respect. They were frequently asked the value of the property, and, after stating the value, they were asked how much less it was worth by reason of the obstruction. These questions were asked and answered in most cases without objection, and afford no ground for reversal. *Railroad Co. v. Fisher*, 42 Kan. 675.

The judgment of the district court will be affirmed. All the justices concurring.

Obstruction of Access to Property—Right to Damages.—See notes, 20 Am. & Eng. R. Cas. 85; 14 *Id.* 143.

STATE

v.

OHIO RIVER R. CO.

(*West Virginia Supreme Court of Appeals*, Nov. 15, 1898.)

Railroad in Highway—Duty to Restore Road—Nuisance.—Where a railway company takes and occupies a part of a county road without having condemned it, yet with the consent of the county court duly given, but on the condition that the company shall restore the county road to its former state, or to such state as will not unnecessarily impair its usefulness, and fails to comply with the condition, the railway company may be proceeded against by indictment for maintaining a nuisance, and fined for obstructing and injuring the county road.

ERROR to Cabell circuit court.

Vinson, McDonald & Thompson, for plaintiff in error.

T. S. Riley, Atty.-Gen., for the state.

HOLT, J.—This is an indictment found in the circuit court of Cabell county on August 7, 1889, against the railroad company, for obstructing a public road, to which defendant, by its attorneys, appeared and entered the plea of not guilty. By consent it was submitted to the Case stated.

court, who found defendant guilty, but at the same term set aside the finding and judgment, and ordered trial by jury. The jury found defendant guilty. There was a motion to set aside the verdict, but the court, overruling the motion, fixed the fine at \$50, and gave judgment therefor. Defendant excepted, and filed a bill of exceptions setting out all the evidence; also, one setting out all the instructions given for defendant, those refused, and the one given as modified over defendant's objection—both signed and made parts of the record.

The law involved and the material facts are as follows: By the constitution all railroads are declared public highways.

Law and facts involved. Section 9, art. 11, Const. Under clause 6, § 50, c. 54, of the Code, the county court of Cabell, by order of March 12, 1887, authorized and empowered the Ohio River Railroad Company to construct its railroad as now located in Cabell county, where it interferes with county property, roads, etc., across, along, and upon such county property and roads which the route of such railroad shall intersect or touch; but such company shall restore such county roads thus intersected or touched, at its own costs and expenses, to their former state, or to such state as not unnecessarily to have impaired their usefulness, and shall keep the crossings of such county roads in repair. Four commissioners were appointed on behalf of the county, any three of whom could act to accept and receive the road from the railroad company when completed by it as therein indicated, etc. Under this authority the Ohio River Railroad Company, in 1887, constructed its roadbed along the county road at certain points in the county above the town of Guyandotte, laid their track, and now occupy and use the same. The company built another, called the "Substituted Road," at various points generally back from the river, between the railroad and the hill. The evidence on behalf of the state is that such substituted road is not as good as the one taken, not built according to the agreement and as required by the order of the county court, and was never received by the commissioners. The evidence on the part of defendant tends to show that the substituted road is as good as the old road, in some respects better, by being moved back from the river bank, but, again, being necessarily on ground more likely to get muddy in the winter-time; that the commissioners were satisfied with the substituted road. But the jury found against the defendant, and, unless misled by some erroneous instruction, we must, in that state of the testimony, take it that they found correctly. The grounds of error relied on by the defendant are: (1) statute of limitations; (2) modifying

the instructions of defendant; (3) the jury disregarding the court's instructions; (4) the court refusing to grant a new trial.

I agree fully, with counsel for defendant, that railroads should not be needlessly harassed, nor dealt with harshly. They are indispensable in these times as high-ways; such our constitution makes and calls them. They indicate the character and reach of modern civilization. The proceeding by indictment is awkward and stiff at best, and it is at least doubtful whether, on conviction, the railroad track could be torn up and removed as a nuisance, for it was laid down in that very place with the sanction of the general statute and the consent of the county court. At any rate, the criminal proceeding has no capacity of adaptation or direct efficiency to bring about the restoration of the county road. One of the civil remedies suggested in *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 54 Am. & Eng. R. Cas. 538, is better suited to bring about directly what we must infer to be the main purpose—the restoration of the road. Nevertheless, we have to deal with this case as we find it, seeing only that the rules of law as settled in such cases have been given to the jury correctly, according to what the testimony tended to prove. In the case of *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 54 Am. & Eng. R. Cas. 538, there is a full discussion of this subject by Judge BRANNON, delivering the opinion of the court, in which the obstruction of ordinary public streets and roads by railroads, under the authority of law and with the consent of the town and county authorities, is fully discussed in all its bearings, both as to the offence and the civil injury, and the mode of dealing with it by indictment, *mandamus*, and mandatory injunction in the nature of a bill for specific performance; and this is followed by the case of *State v. Monongahela River R. Co.*, 37 W. Va. 108, an indictment and state of facts similar to the indictment and facts in this case, in which it is held that if a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways, upon the express condition that it shall restore such highways to their former state, or to such state as not unnecessarily to impair their usefulness, takes possession of a part of a highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under section 45, c. 43, of the Code, notwithstanding it has such authority from the county court. This indictment is founded on section 45 of chapter 43 of the Code (ed. 1891, p. 330): "Any person * * * who shall

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—Nuisance.

without lawful authority * * * obstruct or injure any road, shall be guilty of a misdemeanor; and on conviction thereof shall be fined not less than ten nor more than fifty dollars." See *State v. Chesapeake & O. R. R. Co.*, 24 W. Va. 809, 19 Am. & Eng. R. Cas. 429. This has been the law since July, 1850. See Code 1849, c. 97; Code 1860, p. 490. See *Dimmett v. Eskridge*, 6 Mumf. 308. Counsel for defendant quote from *State v. Chesapeake & O. R. R. Co.*, 24 W. Va. 809, 811, 19 Am. & Eng. R. Cas. 429, as follows: "Before the defendant could be convicted, it was incumbent on the state to establish by competent evidence that Howell's lane road [the road in question], mentioned in the indictment, was, at the time the same was alleged to have been obstructed, a public road; that the same had been obstructed within a year next before the finding of the indictment; and that it had been obstructed by the defendant. Failing to prove either of these facts, the defendant was entitled to an acquittal." Defendant claims that this was not shown to be a public road. But this defendant recognized it to be a county road when on March 12, 1887, it moved the county court for leave to occupy it, and was by order of that date authorized and empowered to construct its railroad as then located, on, along, and across the said county road. Other evidence shows that it was the public road leading from the town of Guyandotte up the Ohio River, through Cabell county, to the Mason county-line, and has been used and worked and recognized by the county as a road for many years.

As to the statute of limitations. The act complained of, in its inception, was in March, 1887, and this indictment was found at the August term, 1889, and defendant claims that it was barred. If it were not shown to have been a continuing offence, it would have been barred. But in *State v. Monongahela River R. Co.*, 37 W. Va. 108, a case very much like this, the defendant was held to be guilty of maintaining a nuisance; that the giving of leave to occupy and use the said road for the railroad track was upon the express condition that the company should restore it; that the company cannot enjoy the grant, and dispense with the condition; that such authority affords no protection for excess beyond departure from, or failure to comply with, the conditions. See *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 54 Am. & Eng. R. Cas. 538, and cases there discussed. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152, 162; 2 Wood, Nuis. c. 23, § 753. It is a continuing offence, and the defendant is under a legal obligation to remove it, and indictable when he suffers it to continue. 1 Bish Crim. Law (8th ed.), § 433; Elliott, Roads & S.

Application of
statute of
limitations.

490, 493. The instruction No. 1, given on motion of defendant, is based on Ratcliffe's Case, 5 Grat. 657—that if defendant entered upon the road set out in the indictment under a claim of right, believing it to be its own, and that it had a *bona-fide* right thereto, then the jury should find for the defendant—and has no application to the case as a defence in bar; for this offence consisted, not in the act of occupying the old county road (the company had a license to do that), but it was on the condition precedent that the new road substituted for that part of the old one taken should be such a restoration as the law and the order of the county court contemplated and required. The failure of defendant to make such restoration of the old road is the gist of the offence, and it requires no other criminal intent than the intentional occupation of the old road, and the wilful neglect or refusal to restore it.

This also disposes of the second ground assigned for error, viz., in improperly modifying instructions of defendant; for the court properly added that, to constitute a defence, the defendant must show that it had complied with the conditions under which it was permitted to enter and occupy, set out in the order of consent; and such modification made it consistent with instruction No. 4, given the jury on motion of defendant, which reads as follows: "No. 4. The court instructs the jury that if they believe from the evidence in this cause that the defendant made the alterations and changes in the county road where its track occupied the old road, and such alterations and changes restored the county road to its former state, or to such state as did not unnecessarily impair the usefulness of said road at the time such change was made, then you must find for the defendant." Leaving out of view the subject of crossings, etc., this instruction propounds the law correctly in this state, except where there may be some special reason for charging the company with a continuous duty, and in effect it called upon the jury to apply it to the facts as they should find them to be according to the evidence, and they returned a verdict of guilty. There is a good deal of testimony tending to show that the defendant had in substance made such restoration, and that the trouble with the new road was that it had to be built back from the river, next to the hill, where the wet weather and freezing through the winter made it muddy, narrowed it by slips, and put it out of proper width and shape. On the part of the state, three witnesses were examined who state that the defendant did not properly restore the old road by the new one, and one of them, a commissioner appointed to receive it, declined to receive on that account; so that no case is made out for a new trial on the ground of the verdict

Duty to restore
highway.

being unwarranted by the evidence, and the judgment must be affirmed.

Railroads as Nuisances in Streets.—See note, 36 Am. & Eng. R. Cas. 37.
General Obligations of Railroad Companies as to Highways.—See note, 20 Am. & Eng. R. Cas. 58.

Indictments for Obstructing Highways.—See notes, 19 Am. & Eng. R. Cas. 433; 17 *Id.* 172.

Railroads upon Highway—Authority of County Court—Duty to Restore Highway—Indictment for Nuisance.—*State v. Monongahela R. Co.* (W. Va., Nov. 26, 1892.), 16 S. E. Rep. 519, it was held that if a railroad company, under authority from a county court giving it license to build its road upon public highways with the express condition that it shall restore the highways to their former state, takes possession of a part of a public highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under the Code.

Obstructing Highways—Jurisdiction of County Commissioners.—In *Dickinson v. New Haven & N. R. Co.*, 155 Mass. 16, under the statutes of Massachusetts providing that, when a railroad is laid out across a highway or other way, it shall be so constructed as not to obstruct it; that the county commissioners shall have original jurisdiction of all questions touching obstructions to highways or townways caused by the construction of railroads within their jurisdiction; and that the supreme court may compel railroad corporations to comply with the orders of county commissioners in all cases touching obstructions to highways, it was held that railroad companies which lay out their lines across highways are subject to the jurisdiction of the county commissioners in which such highway is located in respect to their duty of not obstructing the highways, not only at the outset of the construction, but continuously, and that such commissioners may at the outset pass such decrees as seem suitable, and, if necessary, pass further decrees at a later date.

Public Right—Adverse Possession.—In *Village of Wayzata v. Great Northern R. Co.*, 450 Minn. 438, it was held that the possession of a railroad company entering under a right given in its charter, no other claim of right appearing, and there being no exclusion of the public use, is consistent with, and not hostile to, the public right, and is not adverse. But where the charter does not authorize the construction of buildings on the highway, the occupation of parts of the highway with such buildings in exclusion of the public use may be adverse to the public right, and may ripen into title by adverse possession. The court said: "The charter of the Minnesota & Pacific Railway Company (Laws Ex. Sess. 1857, c. 1, § 7) granted it 'the right and authority to construct its railroad and branches upon and along, across, under, or over any public or private highway, road, street, plank-road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank-road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use.' The corporation which succeeded to the franchises of that company laid its track upon and along Lake street, and maintained it there until such franchises and the railroad passed to defendant, which continues such use of the street. It is unnecessary to consider whether the condition attached by the charter to the right to lay a railroad in a public highway or street, to wit, 'if the same be necessary,' is a continuing condition, so that, if a court should consider it no longer necessary, it might order the railroad to be removed; for the trial court found, and the evidence sustains the finding, that it is now necessary to maintain the railroad

on the street. But the condition, 'the said company shall put such highway, road, street, plank-road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use,' is, from its nature and manifest purpose, a continuing one, so that the company may at all times be required to keep the highway, etc., in the specified condition and state of repair, so far as reasonably consistent with the presence of the railroad upon it. This justified the court, upon the facts found, in directing what the defendant should do to meet the requirements of the condition. So far as the findings of facts are sufficiently pointed out in the assignments of error to call upon us to examine them, we see no reason to doubt their correctness. There is not sufficient assignment of error to the facts specified in clause 13 of the findings, the assignment being general as to all of them—of which there are at least half a dozen. When a railroad company, with such a right granted it in its charter as in the above-quoted clause from defendant's charter, lays its track upon and along a road or street, it will be presumed to have entered and to be in possession under that right, and its possession will be consistent with, and not hostile or adverse to, the public right. Something more than the mere presence of the track upon the road or street—a claim of a hostile right, or an exclusion of the public from the use—will be required to show the possession adverse to the public. The clause quoted does not contemplate the construction upon a road or street of the company's stations, depots, or other buildings, nor the use of it as a railroad-yard. There being no charter-right to which the occupation of the street by buildings could be attributed, and as such occupation of the spaces covered by the buildings was necessarily in exclusion of the public use as a street, and so hostile to the public right, adverse possession of the parts of the street thus exclusively occupied may be claimed."

Right to Destroy Public Highway—Damages.—In *Louisville & N. R. Co. v. Whitley County Court* (Ky., Jan. 4, 1894.), 24 S. W. Rep. 604, it was held that a charter authorizing a railroad company to lay out a railroad between certain termini, and to construct "other branches," does not authorize it to so construct its road as to destroy a public highway, since an intention of the legislature to grant a power to take land, already appropriated to another public use must be shown by express words or necessary implication, and that where a county is unable to prevent the destruction of a highway by a railroad company in the construction of its road, it may sue the company for damages.

Duty to Restore Highway.—In *Village of Wayzata v. Great Northern R. Co.*, 450 Minn. 438, it was held that, where the charter of a railroad company gives it a right to construct its railroad upon and along any highway, road, street, etc., if necessary, but requires the company to "put such highway," etc., "in such condition and state of repair as not to impair or interfere with its free and proper use," the requirement is a continuing one, so that the company may at all times be required to keep the highway in the specified condition and state of repair, so far as consistent with the presence of the railroad upon it.

Measure of Damages for Lands Taken by Railroad Company—Benefits as Set-off.—In *Chicago, K. & W. R. Co. v. Woodward*, 47 Kan. 191, it was held that upon the trial of an appeal from the award of commissioners appointed to condemn a right of way for a railroad company along a highway, it is not error for the trial court to instruct the jury that they are not to take into consideration any benefits which might accrue to the plaintiff by reason of any change in the location of such public highway. The court said: "It is argued that, because the highway was not vacated, no compensation should have been awarded for the right of way at all, for, under the statutes of this state, the railroad company had the right to construct

and operate its railroad upon the public highway; that one of the uses to which it may be put is the construction and operation of a railroad along and upon the same. We are not prepared to subscribe to this principle. While the adjudicated cases are not uniform, the weight of authority is in support of the rule that the construction of a railroad along a highway imposes an additional burden, and constitutes a taking, within the constitution. The following cases hold that a railroad is not one of the legitimate uses of a highway, and for such an occupation there should be additional damages awarded to the adjoining owner: *Railroad Co. v. Reed*, 41 Cal. 256; *Imlay v. Railroad Co.*, 26 Conn. 249; *Railroad Co. v. Steiner*, 44 Ga. 546; *Cox v. Railroad Co.*, 48 Ind. 178; *Stange v. City of Dubuque*, 63 Iowa, 303; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Hartley*, 67 Ill. 439; *Phipps v. Railroad Co.*, 66 Md. 319; *Springfield v. Railroad Co.*, 4 Cush. 63; *Railroad Co. v. Heisel*, 47 Mich. 393, 10 Am. & Eng. R. Cas. 260; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Railroad Co. v. Ingalls*, 15 Neb. 123, 20 Am. & Eng. R. Cas. 60; *Williams v. Railroad Co.*, 16 N. Y. 97; *Fanning v. Osborne*, 34 Hun., 121; *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Mills, Em. Dom.* § 32; *Lewis, Em. Dom.* 111."

Injunction to Restrain Destruction of Track.—In *Southern Pacific R. Co. v. Ferris*, 93 Cal. 263, it was held that, where a person had dedicated a strip of land in front of his premises as a public highway, and had expressly excepted it as such in his deed of the land, a railway company was entitled to an injunction against the grantee to restrain the destruction of its track laid along such highway, although the grantee had assumed ownership over the strip because it had never actually been used as a public highway.

EGBERT *et al.*

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(Indiana Appellate Court, March 16, 1893.)

Railroads in Street—Grading—Injury to Abutting Owner—Liability.—Where the fee of a street is in the abutting owners, a railroad company which has been granted a right of way through such street is liable for damages inflicted upon such abutters, although caused by acts authorized by the statute, which imposed no express liability, the settled law of the state being that the owner of a lot abutting upon a street may have a peculiar interest in the easement in the street in front of his lot; and a person who has granted to a railroad company a right to come through his land cannot be held by implication to have granted a release from damages accruing from the extension of a fill beyond the limit of the said right of way upon a street not dedicated when the right of way was granted.

Same—Changing Grade—Railroad not Possessed of Municipal Power.—The railroad company, by reason of acting under statutory command in changing the grade of said street did not become clothed with the rights

of the public, as exercising the functions of the municipal officers who controlled the streets, so as to be relieved from liability to property-owners for damages to their land.

APPEAL from St. Joseph circuit court.

Andrew Anderson and Lueris Hubbard, for appellants.

J. H. Baker, Geo. C. Green, and O. G. Getzen-Danner for appellee.

GAVIN, J.—The appellants brought this action to recover damages for an injury to real estate. A trial resulted in a finding and judgment for the appellee. The facts out of which the controversy grew are as follows: On the 30th of March, 1852, Jeremiah H. Service owned and was in possession of the land described in the appellants' complaint, and now owned by them. Said Service, for a valuable consideration, conveyed a tract of land 100 feet wide for a right of way over and across his lands to the Northern Indiana Railroad Company, "with the right to construct and maintain a railroad and all necessary appurtenances across and upon the land above designated." The appellants have acquired the title to these lands, and the appellee, by consolidation, has succeeded to all the rights of said Northern Indiana Railroad Company under said deed of conveyance. In 1853 the Northern Railroad Company constructed a railroad upon this right of way. The railroad so constructed continued to be used substantially as constructed until 1888. In 1881 the town of New Carlisle extended Filbert street to the north, across the right of way of the appellee, and, also by proper proceedings, appropriated a strip of land 40 feet wide for a street, called "Zigler street," the fee thereof being in appellants. Zeigler street, so laid out, lies north of, and adjoins the appellee's right of way so acquired of Service, and it also joins the extension of Filbert street. In 1888 the appellee, as a part of a general system of improving its roadbed, raised the grade of its roadbed along the above-mentioned right of way. This was done wholly on and within the company's right of way, except in so far as it extended beyond it to make the approaches for the street-crossing, and was done in a careful and skilful manner. At the crossing of Filbert street the roadbed was raised 3 9-10ths feet. This made it necessary to fill in the approach to the crossing which was on and along Zigler street, extending for a distance of about 135 feet beyond the line of appellee's right of way, thereby cutting off and materially interfering with appellants' ingress to and egress from the lands which fronted on said approach. It is admitted that the fill on Zigler street was carefully and skilfully put in, and was necessary to raise the

street to correspond with the increased height of the crossing.

There was but one question presented for our determination: "Is the appellee liable for damages sustained by the appellants by reason of the filling of Zigler street, whereby access to their ground, fronting thereon, was cut off or materially interfered with? It is urged by appellee that it is not thus liable, upon three grounds: (1) Because the right to raise the street to correspond to the railroad is carried by and included in the grant of the original right of way by necessary implication; (2) because appellee, in making the change of grade, was only obeying the statute, and could thereby incur no liability; (3) because appellee was simply in pursuance of the statute exercising the functions of the municipal officers who controlled the street, and who would have had a lawful right to change the grade of the street, without liability except for negligence. We are unable to assent to either proposition. It would be carrying the doctrine of grant by implication beyond all reason to say that, where one grants a right of way across his land, he thereby releases, not only all damages which may result to his land from the construction of the road upon the strip granted, but that he must also be held to contemplate and release damages accruing from the extension of a fill beyond the limit of its right of way, and upon a street which was not in existence until nearly 30 years after the road was built, the fill being made necessary by reason of the company's voluntary change of the grade of its road-bed. In *Railway Co. v. Williams*, 92 Ala. 277, it was held that a grant of a right of way across a tract of land did not of itself operate as a release of damages occasioned by the change of grade of an abutting street so as to make it conform to the grade of the railroad which crossed it. The rights of the railroad company under the grant were restricted to the strip 100 feet in width, and when, it encroached upon the land-owner outside of this strip, it became liable to him. *Roushange v. Railway Co.*, 115 Ind. 106, 33 Am. & Eng. R. Cas. 142.

Appellee's justification of its acts is based upon subdivision 5, § 3903, Rev. St. 1881, by which a railroad company is given the right to construct its road upon or across any highway which it may intersect, but it must restore the highway so intersected to its former state, or in a sufficient manner as not to unnecessarily impair its usefulness. The provisions of this section apply not only to highways in existence at the time of the building of the railroad, but to those subsequently and law-

Question presented.

Easement of abutters.

fully in existence. *Railway Co. v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608. It is settled law in this state that the "owner of a lot abutting upon a street may have a peculiar and distinct interest in the easement in the street in front of his lot. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to or egress from the lots." To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as to the lot itself." "Nor can the street be invaded so as to inflict special or peculiar damage or injury upon the adjoining lot owner's property without rendering the wrongdoer liable for such damage." *Railway Co. v. Eberle*, 110 Ind. 546, 32 Am. & Eng. R. Cas. 220; *Decker v. Railway Co.* (Ind. Sup., decided at present term, Feb. 1, 1893.), 33 N. E. Rep. 349. "The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away nor materially impaired without liability to the owner to the extent of the damage actually incurred." *Railway Co. v. Eberle*, *supra*. This special interest is without regard to the ownership of the fee in the street. "The owner of the fee in a suburban highway has a special proprietary right distinct from that of the public, and this right cannot be taken without compensation. In a case decided in 1855 it was held that abutters have a private right, distinct from that of the public, which even the legislature could not take away except to appropriate to a public use upon payment of compensation. *Common Council v. Croas*, 7 Ind. 9. This doctrine has been steadily adhered to by this court. *Kincaid v. Gas Co.*, 124 Ind. 577, 34 Am. & Eng. Corp. Cas. 73; *Haynes v. Thomas*, 7 Ind. 38; *Lostutter v. City of Aurora*, 126 Ind. 436; *City of Indianapolis v. Kingsbury*, 101 Ind. 211; *Town of Rensselaer v. Leopold*, 106 Ind. 29; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Egerer v. Railway Co.* (N. Y. App.), 29 N. E. Rep. 95; *Elliott, Roads & S.* 526-528. Under these authorities, this special interest adheres to the owners of either urban or suburban property. In this case both the fee which is in the appellants and this special and peculiar interest have been invaded by the appellee. They suffer by reason of the acts of appellee not only loss of the same kind and character which is suffered by the public in general, but loss of a different kind, accrued by reason of the injury to their special and individual property interests. For injuries of this character a right of action is given by the law, even though the acts may have been done by statutory direction. *Protzman v. Railway Co.*, 9 Ind. 467. In *Railroad Co. v. Dick*, *Id.* 235, the court, by one of its

ablest judges (Davison), held the company liable for damages inflicted upon one whose land was not taken, although caused by acts authorized by the statute with no express liability imposed by the statute. He distinguishes between the acts of those exercising a public trust and private corporations engaged in forwarding their own enterprises, even though *quasi* public in their character. It is said: "It is therefore evident that the legislature have no power to authorize in any case either a direct or consequential injury to private property without compensation to the owner. If, then, such a grant, when expressly made, would be in conflict with the constitution, we are not allowed to infer that such an authority was intended to be granted from the mere fact that a railroad was authorized. It seems to follow that the defendants, having voluntarily, and for their own profit, so constructed their road as necessarily to injure the plaintiff, there being no remedy given by their charter, are liable in the present action."

The statute gave to this company the extraordinary right to tear up the public highways, and build its road across them, and it is reasonable to construe this authority as a consent to forego thus far the claims of the public to the highway, but it is not reasonable to construe the statute as intending to grant authority to injure and interfere with private property rights without making compensation therefor. In this view we are expressly sustained, not only by the last case cited, but also by *Railway Co. v. Eberle*, 110 Ind., on page 546, 32 Am. & Eng. R. Cas. 220, where it is held that, by the authority of those having control of the highways, the public servitude may be abridged; but the private rights of those deprived of, or seriously inconvenienced in, their access to their lots, are in nowise affected by the permission obtained from the public authorities. The limitation of the grant to the interest of the public in the highway is recognized in *Indianapolis, etc., Gravelroad Co. v. Belt Ry. Co.*, 110 Ind. 5, 32 Am. & Eng. R. Cas. 173, where it is said: "The statute confers upon railroad companies the power to cross highways, and to do so without the payment of compensation so far as the public is concerned." The legislature, acting in behalf of the people, intended to grant, and by the act did grant, to railroad companies the right to cross public highways without responsibility to the public. It was not the purpose to grant to railroad companies power to violate private rights. That the legislature could not do." In *Lamm v. Railway Co.*, 45 Minn. 71, 46 Am. & Eng. R. Cas. 42. "Acts of legislatures or ordinances of cities authorizing a railway company to construct its road on public highways or streets

relate solely to the public easement. Such acts give the right as against the public merely. But neither the state nor any of its municipal corporations can grant private property, even for public uses in this way." The state authorized appellee's predecessor to build its road across the highways. It did not require the company to do so, but, granting it the privilege, it annexed to the privilege a duty—that of restoring the highway as nearly as possible, and thus making the crossing. The change of grade or the approaches required by reason of a difference between the grade of the highway and railroad were made necessary by the voluntary act of the company for its own convenience and benefit, not for the convenience of the public travelling over this highway, for whom the former level road was preferable to one at a grade.

Nor are we favorably impressed with the theory that the company is to be considered as acting in the capacity of municipal officers, and therefore empowered to change grades without liability except for negligence. In *Protzman v. Railway Co.*, 9 Ind. 467, it was held that the right of changing grades inherent in the council was not to be delegated to a railroad company for its private advantage at the expense of the property-owners. When municipal officers change the grades of streets, they are expected to act for the public with the public accommodation and convenience in view; but when a railroad changes a grade of a highway, as here, it is done without any consideration for the convenience of the public, but simply with regard to its own profit and advantage. The company grades its own road first as suits its needs, and then brings the highway to it. We are aware that there are authorities announced by those eminent in the law opposed to the views which we have expressed. Counsel for appellee press with vigor the applicability of the case of *Ottenot v. Railway Co.*, 119 N. Y. 603, 43 Am. & Eng. R. Cas. 129. The opinion meets the case in hand very squarely, except it is distinguishable in that the fee of the street was not in the lot-owner, but, as appears from the report of the case in 119 N. Y. 603, 43 Am. & Eng. R. Cas. 129, the opinion did not meet the approval of a majority of the judges, and its force as an authority is thereby somewhat lessened. In *Conkling v. Railroad Co.*, 102 N. Y. 107, 26 Am. & Eng. R. Cas. 365, and in *Rauenstein v. Railway Co.*, 136 N. Y. 528, 56 Am. & Eng. R. Cas. 655, the doctrine asserted by the *Ottenot* Case is largely affirmed, although in the latter case the court divides nearly equally.

After giving these cases full consideration, we are constrained to believe that the views we have determined upon are in consonance with equity and justice, and are supported by ample

Railroad acting as municipality.

authority within and without our own state. "Where a railroad raises or lowers the grade of a highway to adjust it to the grade of its track, it is a taking of the property of the abutting owner, for which and the injury to the lots the company must make compensation." Mills, Em. Dom. p. 388, § 199. In 2 Wood, Ry. Law, p. 966, the rule is thus laid down: "The necessary approaches constructed for the purpose of restoring the streets or highways to their former condition of usefulness, under and as a condition to the exercise of the privilege, are a part of the railroad structure, authorized by its charters; and in either section a party incidentally injured has as complete and perfect a remedy against the company for consequential damages as he has for a direct injury caused by the original construction of the railroad." *Parker v. Railroad Co.*, 3 Cush. 116, was an action for damages occasioned by building the approaches to a bridge by which a highway was carried over a railroad track instead of crossing at grade. The land damaged abutted the highway intersected and the approach, but did not touch the railroad. In speaking of the adjustment of the highway to the railroad, the court says: "Then how, by whom, and in what manner should this adaptation be made? Equity would answer plainly enough that it is not required to be made for the benefit of the turnpike company, nor of the town. It is an inconvenience to which they are subjected for the benefit and accommodation of the railroad company, to which it is essential that it should be kept on a certain grade, whereas the grade of a turnpike or common road may be changed, though with some inconvenience." It was further held that the raising of the approaches was a part of the franchise given by the charter, and that the bridges on which highways were carried over the railroad, and the approaches to them, were as much a part of the structure authorized by the charter as the railroad itself, and therefore within all the provisions for compensation for damages occasioned by laying out and building the road. In *Bradley v. Railroad Co.*, 21 Conn. 294, the same holding is made, and the same general line of reasoning followed. Referring to the approaches and bridge across the highway, the court says: "The raising of the bridge was necessary in order to allow of the passing of the engines and cars on the railroads; and the making of the embankment was necessary in consequence of the raising of the bridge, in order to restore the highway to its former usefulness, which it was made the duty of the defendants to do; and both were raised for the sole benefit and accommodation of the defendants, and not of the public." And the court (on page 311) expressly disavows the doctrine that the company became clothed with the rights of the public

in respect to the restoration of the highway. These propositions are supported also by *Burritt v. City of New Haven*, 42 Conn. 174, and *Nicholson v. Railway Co.*, 22 Conn. 85. While the charters under which the companies acted in these cases were not exactly similar to our statute, the reasoning and principle advanced apply to the case in hand. That the approaches are a part of the crossing which the company must construct. See also *Town of Roxbury v. Railway Co.*, 60 Vt. 121; *Farley v. Railway Co.*, 42 Iowa, 234; *Titcomb v. Railroad Co.*, 12 Allen, 254. The case of *Buchner v. Railway Co.*, 56 Wis. 403, and the same case in 60 Wis. 264, 14 Am. & Eng. R. Cas. 447, are substantially identical with the case in hand in all material features save that of the grant by implication, and decide the questions against appellee's views. This case is followed by *Shealy v. Railroad Co.*, 77 Wis. 653.

It is conceded in this case that the fill or approach made by the appellee extended beyond its right of way upon the highway fronting appellants' property, the fee of the highway being in appellants. It is also undenied that the means of access to and egress from the property was materially and seriously impaired. Appellee must therefore respond for the damage done. *Railway Co. v. Smith*, 52 Ind. 428; *Roushlang v. Railway Co.*, 115 Ind. 106, 33 Am. & Eng. R. Cas. 142.

The judgment is therefore reversed, with instructions to the court below to grant a new trial.

Railroads in Streets—Liability for Changing Grade.—See *Rauenstein v. New York, L. & W. R. Co.*, and note, *post*.

RAUENSTEIN

v.

NEW YORK, LACKAWANNA & WESTERN R. CO.

(186 *New York*, 528.)

Railroads in Street—Changing Grade—Liability to Abutting Owner.—Where a railroad company in changing the grade of a street performs a duty imposed by public law and prescribed by municipal ordinance, it is not liable for damages to abutting owners resulting from the necessary changes, individual interests being subordinate to the requirements of the public the same as though the city authorities had done the work themselves.

O'BRIEN and MAYNARD, JJ., *dissenting*.

APPEAL from Buffalo superior court.

This action was brought to recover damages of the defendant for injuries alleged to have been sustained by the elevation of a part of the roadway of Commercial street, in the city of Buffalo, in front of her premises, which she alleges to be an unlawful encroachment upon the street—an obstruction to her lawful rights in it, and a nuisance. The facts are that the defendant railroad was laid through Water street, and, where it intersected Commercial street, was constructed upon an embankment about five feet and nine inches above the former grade of Water street, made necessary in order to cross Commercial slip. In order to permit of travel upon Commercial street over the railroad at this intersection of the streets, it was necessary to raise the grade of Commercial street on either side of Water street; and this elevation of the grade of the street extended in front of, and nearly the whole length of, the street-line of the plaintiff's premises. The embankment was within about a foot of plaintiff's sidewalk, and was some 20 feet in width. The plaintiff did not abut upon Water street, and her title to her lands was bounded upon Commercial street by the line of the street. As an abutting owner upon Commercial street, she bases the right to recover damages for the obstruction of the roadway in front of her premises, practically, upon the ground that if the construction by defendant of its embankment in Water street was illegal, as to abutting owners there, the illegality of its act extended to the grading up of Commercial street, and in such degree as to subject it to liability to injured property-owners in that street. An appeal from judgments recovered by her in the superior court of Buffalo was heard by this court in its second division (120 N. Y. 661), and the judgments were reversed, expressly, upon the authority of our decision in the case of Ottenot against this same company (119 N. Y. 603, 43 Am. & Eng. R. Cas. 129), and a new trial was ordered. Upon the new trial the jury rendered a verdict for the defendant, by the direction of the trial judge. The defendant appealing to the general term of that court, the judgment was reversed, and it now appeals to this court from the general term order of reversal.

Rogers, Locke & Milburn (John G. Milburn, of counsel), for appellant.

O. C. De Witt (Geo. W. Cothran, of counsel), for respondent.

GRAY, J.—The only difference between the facts of this case and that of the Ottenot Case, 119 N. Y. 603, 43 Am. & Eng. R. Cas. 129, is that Ottenot's premises were on the opposite side of Commercial street, and the embankment

in the street did not extend so as to entirely cover his side of the street; a fact, however, which can have no bearing upon the legal aspect of the question presented. Though the members of this court did not all concur with the opinion which was delivered in the Ottenot Case, they concurred in the result reached, on the ground of there being another remedy, as also because of error in the admission of evidence as to damages. That other remedy was referred to in the opinion as being given by a certain provision of the city charter, providing for compensation to abutting owners under certain conditions, where damaged by alterations in the grade of a street. Therefore, while the members of the court failed to concur with the opinion in the general discussion of the question of the defendant's liability to plaintiff, all did agree that the defendant was not liable in damages, inasmuch as the construction in Commercial street was a change in the grade of the street, for any injury from which a remedy was given under the provisions of the city's charter. The position, then, is this: the concurrence of views in the Ottenot Case being that there was a change in grade of the street, and hence no liability on the part of the company, can we now sustain this reversal by the general term without overruling the Ottenot decision, and likewise the decision of the second division of this court, which held the present case disposed of by the Ottenot Case? If we are prepared to do this, we must still go farther, and hold that the rule laid down in *Conklin v. Railroad Co.*, 102 N. Y. 107, 26 Am. & Eng. R. Cas. 365, is no longer authoritative.

Leading cases
reviewed.

The general term opinion holds what seems to me a rather strange view of our recent decision in the case of *Reining* against this same defendant (128 N. Y. 157). It was supposed by that court that its effect was to so far modify previous views with respect to the legality of the structures in Water and Commercial streets as to leave the general question open to further examination, notwithstanding the Ottenot Case. Proceeding, thereupon, to consider the decisions in the *Conklin* Case, *supra*, and the *Uline* Case, 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3, a distinction was deemed to exist between them and the *Buffalo* cases, in that the railroad in the former cases was a lawful structure, whereas, in these cases, on the strength of the view taken of the opinion in the *Reining* Case, the construction in Water street was such an illegal appropriation of the street, and so unauthorized an act, as to constitute the structure a nuisance, not only as to property-owners upon the street, but as to those upon Commercial street who were injuriously affected by the raising of the grade of the

street to meet the railroad grade. The Reining Case has been quite misapprehended by the court below. That case is no more controlling upon the disposition of the present one than was the Ottenot Case upon the Reining Case, as was remarked by Judge ANDREWS, who wrote in the Reining Case. The plaintiffs in that case were property-owners upon Water street; and their right to recover compensation was placed upon the ground that the railroad company had practically included them from the use of the street by the presence of the railroad upon the embankment, and had thus invaded a legal right belonging to the abutting property-owner. The reasoning of the decision was that, while it was quite probable that the general interests of Buffalo and of the public were promoted by the appropriation of the street, it by no means followed that a lot-owner whose property is injured should bear the loss for the public benefit. The learned judge said that the public cannot "justify such an appropriation of a street by a municipality in aid of a railroad enterprise," and that "the legislature cannot legally authorize structures for railroad purposes to be erected [in streets] * * * which practically exclude the abutting owners, * * * without compensating them for them for the injury suffered." Again, referring to the power conferred in the city charter with respect to streets, he held that the city "cannot, under guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive, use of a railroad company, or so as to cut off abutting owners, * * * without making compensation," etc. The opinion pointed out clearly the distinction between the case of a change of grade in the street, merely, and the case then at bar, where the object of the elevation of an embankment in the street was to subserve the railroad use, which was practically if not wholly exclusive. It was because of that distinction that I concurred with Judge ANDREWS in his opinion; conceiving that a property-owner not abutting upon Water street had no right to complain of a change of the grade in his side-street, which a new and lawfully authorized use of Water street had rendered necessary in the interests of the general public. The Reining Case has not modified any existing rule of law, as laid down in the Uline, Conklin, and Ottenot cases. It did not hold that the embankment in Water street for the railroad accommodation was illegal, or that it constituted an invasion of the rights of any one, save as to those of property-owners abutting on Water street. It distinctly recognized the existence of the railroad and of this embankment as being under lawful authority; but for injuries occasioned to the property-rights, within the principle of the decision in the

Story Case, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, an abutting owner could not legally be deprived of his right to compensation by the legislature.

As the Reining Case in no sense overruled the Ottenot Case, the question is to-day the same as it was when we had decided the Ottenot Case; and I do not believe we could, with any appearance of consistency, sustain this plaintiff's right to recover compensation from the railroad company, when we denied it in the other case. Nor do I think we can overlook the fact that the Conklin Case is a controlling authority upon the case before us. The opinion in the Conklin Case was concurred in by all the members of the court. There the railroad company, in crossing a highway, constructed its road through a deep cutting, over which it built a bridge, to which, by embankments on either side of the cutting, the highway was graded up, so as to permit the continuance of the public travel as before. The plaintiff's property abutted on one of the embankments, and he also owned the fee to the centre of the highway so changed, but his right to compensation was, nevertheless, denied; the grounds for the decision, in substance, being that a change of grade invades no private right, and whatever the inconvenience to the abutting owner, it takes from him no property right for which he has not been compensated. Judge FINCH, who delivered the opinion, remarked that, if the highway "became such by dedication, compensation for the easement was expressly waived. If taken by eminent domain, the compensation paid covered all the damages sustained, among which were necessarily embraced such as might flow from a change of grade required for the public use or convenience." "The right of the legislature," he said, "to permit a railroad company to cross a public highway, and either upon the same or a different grade, is, of course, conceded. In the latter case a corresponding change in the grade of the highway becomes necessary." The opinion proceeds to hold that the duty of making that change being imposed by statute upon the railroad company, instead of being left to the commissioners of highways, the company, in the work of restoration, stands in the place of the highway commissioners, without any responsibility to abutters, and having all the official rights of highway commissioners.

The logical sequence of the opinion of the court in the Conklin Case is obviously, to exempt a railroad company from liability for the consequences of a change of grade in city streets which is rendered necessary where intersected by the railroad structure, however great may be the inconvenience resulting to abutting property-owners. The source

of the authority of the railroad company in the Conklin Case

was the same as that under which the company has acted in this case. In either case, under the provisions of the general railroad act, the power is conferred to construct the railroad across any street or highway "which the route of its road shall intersect, or touch; but the company shall restore the street or highway," etc., "thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness." In the case of highways the consent of the commissioners, or an order of the supreme court, is required, while in cities the assent of the municipal authorities is to be had, and in the present case the giving of such assent was provided for in the city charter. It is thus evident that the source of the power to change the grade of the street, to permit of carrying it over the railroad crossing, is in the general or public law, which creates a duty in that respect which is transferred from the local authorities to the shoulders of the railroad company, in the performance of which it stands in the place of the local authorities, with all their immunity from responsibility for any consequential damages, not attributable, of course, to negligence in the manner of performance. If, however, in performing this work of restoring the intersected street to its former state of public usefulness, the company is invested with the immunity conferred upon the local authorities, how can the abutting owner have a legal cause of action for an alleged injury resulting from the change in grade? In reference to the restriction upon the absolute nature of the right of abutting owners, in the case of a municipal control of streets in the public interest, even when privileges and benefits previously enjoyed from the original condition of the streets are curtailed or impaired by the changes, Judge ANDREWS cites (*Reining Case, supra*) "the cases of change of grade" as furnishing "opposite illustrations."

In *Uline v. Railroad Co.*, 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3, where the street and sidewalk in front of the plaintiff's premises were raised by the company so as to conform the grade of the street to the grade of the railroad, it was said, in the opinion: "So much it [the defendant] was bound by law to do under the general railroad act. It [the street] was not, in front of plaintiff's premises, by the act of the defendant, devoted to anything but street purposes; and, as the city could have raised the grade of the street without liability to abutting owners, so it could authorize the defendant to do so without such liability." It is apparent that the general term below, in the discussion

as to the lawfulness of the defendant's railroad construction in Water street, failed to consider the distinction between a case where a statute confers authority upon a corporation to take the property of individuals for some public purpose without making a provision for compensation, and a case where the legislature, exercising an undoubted right, subjects the public property to some new public use, by some extraordinary features of which, however, natural rights, or easements appurtenant to abutting property-owners and constituting property-rights, are interfered with, and consequential injuries ensue. In the first case the statute would be unconstitutional and void, and could confer no rights upon the legislative grantee, while in the latter case there could be no question as to the constitutionality of the act, and as to the legality of an occupation in pursuance of the act by the grantee; but for the damages which could be proved as directly consequential to the use, in its peculiar features, an injured abutting land-owner could recover. That, I think, was the theory of the decision of the Story Case, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596.

The two guiding principles to be deduced from the authorities are that the defendant, being lawfully in Water street, by authority of the public law, and with the assent of the municipality, was not a nuisance, and except as to abutters, invaded no legal rights; and that in building the embankment in Commercial street, to permit of unimpeded travel upon that street over the railroad in Water street, the defendant was performing a duty imposed by the public law, and described by municipal ordinance, and hence could come under no responsibility to adjoining land-owners. In this connection I may say that for such consequential damages as are sought to be here recovered from a railroad company which is lawfully in the occupation and use of a street, but which incidentally, is the occasion of injury to property-owners in an adjoining street, by reason of its performance of the statutory duty to conform its grade to the new use, the legislature might very properly, under limitations, grant a remedy. Without such remedial legislation, however, the case is one of *damnum absque injuria*. Nothing in the Reining Case is in contradiction of the views expressed; and in support of them we have much authority, running back from the Uline Case, *supra*, to that of Radcliff's Exr's v. Mayor, etc., 4 N. Y. 195. This construction in Commercial street was a change of grade made by the defendant under legal compulsion, and individual interests are as much subordinate to the requirements of public interests in such a case as, concededly, they would be if, as matter of fact, the

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grade of street
—Consequen-
tial damages.

city authorities had done the work themselves. As matter of law, its performance by the defendant was a performance by a constituted public authority. In the opinion in the Reining Case Judge ANDREWS defined the line of the limitation to public powers in the control over city streets to be reached when they invaded an abutter's rights. But, outside of that line, "provided that the change be made under lawful authority," the owner "has no legal redress for any injury to his property, however serious, caused by a change of grade." BRONSON, C.J., in *Radcliff's Ex'rs v. Mayor, etc.*, *supra*, in illustrating the extent to which acts may go without rendering persons answerable for the consequences to others, speaks of those cases "which hold that persons acting under an authority conferred by the legislature to grade, level, and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. And this is so," he adds, "whether the damage results from cutting down or raising the street, and although the grade of the street had been before established, and the adjoining land-owners had erected buildings with reference to such grade." The principle seems applicable to this case, where the defendant, acting under the authority of the legislature, has changed the grade of Commercial street. I am quite unable to see how we can sustain the order appealed from, whether we consider what was decided with respect to the question of the defendant's liability in the Ottenot Case, or whether we consider the rule laid down in the Conklin Case, and in prior decisions.

I think the order of the general term, appealed from, should be reversed, and the judgment of nonsuit should be affirmed, with costs in both courts.

All concur, except O'BRIEN and MAYNARD, JJ., dissenting, and ANDREWS, C.J., not voting.

Raising Grade of Street—Abutter Entitled to Damages.—See *Gates v. Chicago, St. P. & R. C. R. Co.* (Iowa), 50 Am. & Eng. R. Cas. 164; *Heining v. New York, L. & W. R. Co.* (N. Y.). *Id.* 205.

Change of Grade in City Streets by Railroad Companies—Damages.—See note, 14 Am. & Eng. R. Cas. 180. *Egbert v. Lake Shore & M. S. R. Co.*, *ante*, p. 648.

Abandoned Canal.—Nuisance—Fee of Abutting Owners.—In *Taylor v. Chicago, M. & St. P. R. Co.*, 81 Wis. 82, it was held that the unlawful construction and maintenance of a canal in a street was a nuisance, and would not cut off, by prescription, the right of an abutting lot-owner to claim the fee to the centre of the street after such canal has been abandoned and filled up.

Title to Fee in Street—Rights of Abutting Owners.—In *Decker v. Evansville, S. & N. R. Co.* (Ind., Feb. 1, 1893.), 33 N. E. Rep. 349, it was held

that the abutting owners had no title to the fee in the street, which, in the case of nonuser would revert to C, where it appeared that the plaintiff acquired title to a lot abutting on a canal, which formerly occupied the line of the said street, but was afterward filled up and used as a street of the city for more than twenty years, C claiming the fee of the street under deeds from the canal company; held also, that the plaintiff could not enjoin the railroad company from laying its tracks on the street without assessing damages to the abutting property, where his injury was the same as that of the public generally. The court said: "When the owner of land lays out a town upon the same, platting it into lots, streets, and alleys, and causing such plat to be recorded, under the provisions of our statute upon the subject, he conveys to the public a mere easement in the streets and alleys, retaining in himself the fee-simple of the land over which such streets and alleys pass. So, when he conveys to a purchaser a lot abutting upon such street, the fee-simple to the centre of the street upon which the lot abuts passes by such conveyance to the purchaser, as a part and parcel of the lot so conveyed. It is upon this principle that it has so often been held that the owner of a lot abutting on a street owns to the centre of the street. *Cox v. Railroad Co.*, 48 Ind. 178. At the time the lot upon which the appellant's building is situate was laid out, the street now in controversy was not in existence, nor was it in existence at the time the appellant acquired his lease. The fee in the land over which it passes was in the Wabash & Erie Canal Company. It was never dedicated by the owner to the public use as a street, but by more than 20 years' use as a public highway the public has acquired the right to use it perpetually. If the public should cease to use it as such highway, Collett would take it discharged of its present burden, and the appellant would have no interest in it. We are unable to perceive any course of reasoning by which the conclusion can be reached that the fee to this street is in the abutting lot-owners, who acquired such lots before the existence of the street.

"Assuming, therefore, that the owner of the lot on which the appellant's buildings are situate does not own the fee to the street upon which it abuts, but that he and the appellant have the right to use it in common with the public, the question remains as to whether the appellant can maintain this action upon the ground that the proximity of the railroad, when completed, will obstruct such street, and will be an injury to his property. It is settled law in this state that the owner of a lot abutting upon a street may have a peculiar and distinct interest in the easement in the street in front of his lot. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress and egress to and from his lot. This is an interest distinct from that possessed by the general public, and is a right appendant to the lot, and the improvements thereon. Such means of ingress and egress is as much property as the lot itself. But whether a lot-owner abutting upon a street may maintain a common-law action, where a structure in the street imposes no new burden on the soil owned by him, depends upon whether or not the occupation of the street with such structure results in damage to his property peculiar and different in kind from that which is suffered by the community in general. *Railroad Co. v. Bissell*, 108 Ind. 118; *Dwenger v. Railway Co.*, 98 Ind. 158, 20 Am. & Eng. R. Cas. 26; *Sohn v. Cambern*, 106 Ind. 302; *Railway Co. v. Eberle*, 110 Ind. 542, 32 Am. & Eng. R. Cas. 220. The 'community in general' does not mean those who use the street, and yet reside at such distance from the railroad, if such be the obstruction of which complaint is made, as suffer none of the annoyances incident to its construction and operation, but it means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to

such a structure. The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as the community in general. Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery, in the absence of a statute entitling the owner to maintain such action. *Railroad Co. v. Heisel*, 38 Mich. 62; *City of Chicago v. Union Building A-s'n*, 102 Ill. 379; *Rigney v. City of Chicago*, *Id.* 64; *Railway Co. v. Eberle*, *supra*. There is nothing in the special finding of facts in this case from which it appears that the construction of its road by the appellee over or upon Fifth street will cut off, or materially interfere with, the appellant's ingress or egress to or from his lot or buildings thereon. The inconvenience which he will suffer, so far as appears from the record in this case, is such as the public generally, who use the street, will suffer. For such an injury, as we have seen, he cannot recover."

JONES

v.

ERIE & WYOMING VALLEY R. Co.

(151 Pennsylvania St. 30.)

Railroad Bridges over Streets—Additional Servitude.—A railroad bridge constructed over a street under authority of the city, at a height of twenty-three feet, imposes a new servitude upon abutting property, for which the owner in fee may recover damages; but consequential damages cannot be recovered on account of abutments built upon the defendants land to support the bridge.

Same—Necessary Inconvenience Resulting from Operation of Trains—Damnum Absque Injuria.—The mere fact that horses in approaching the plaintiff's dwelling might be frightened at the passage of trains over the bridge did not make the bridge an obstruction to access to plaintiff's premises; and neither this fact nor the exposure to noise, smoke, dust, etc., would entitle the plaintiff to recover damages, under the constitution making the person or corporation exercising the right of eminent domain liable to make "just compensation for property taken, injured, or destroyed by the construction or enlargement of their works."

Measure of Damages—Opinion Evidence.—In such a case expert testimony is not necessary to determine the value of city property, but the value of a house or piece of ground is a subject upon which persons familiar with the property, who have formed an opinion, are competent to speak, the value of their opinions being for the determination of the jury.

APPEAL from Lackawanna court of common pleas.

Action for damages caused by the construction of a bridge over a street abutting on plaintiff's property.

Edward N. Willard and Everett Warren, for appellant.
H. M. Hannah and S. P. Price, for appellee.

WILLIAMS, J.—This appeal presents several important questions. One of these does not seem to have arisen heretofore in this state. In New York, and some other of our sister states, it has been considered and decided; but these decisions are influenced by the legislation peculiar to the jurisdiction in which they have been made, and are not as helpful as under other circumstances they might be.

In the case now before us we have the following facts: The plaintiff, Jones, is the owner of a piece of land lying in the northeast corner made by the crossing at right angles of Washington avenue and New street in the city of Scranton. His front upon Washington avenue is 63 feet, and upon New street 95 feet. In the corner, standing back a few feet from the streets, he has a double dwelling-house, and he has one or more dwelling-houses further out New street. The southeast corner, which is directly across Washington avenue from the plaintiff's double house, is owned by the defendant company, as is the northwest corner, which is directly across New street. On each of these corners it has erected a substantial stone abutment about 20 feet high, upon which it supports an iron bridge, 18 feet wide, that spans the intersection of the streets below in a diagonal direction. This bridge is an overhead crossing for the defendant's line of railroad, and the tracks upon it are about 23 feet above the surface of the streets below. The centre of the bridge is about 27 feet from the corner of the plaintiff's lot, and about 40 feet from the nearest corner of his double dwelling-house. The right of way of the railroad company, as the law would define it, would reach over upon the corner of the lot about 3 feet, and overhang a triangular piece of ground beyond the street-lines, having that depth at the corner. The defendant has, however released its right to this corner, and defined the extent of its right of way, so as to exclude therefrom any portion of the plaintiff's land outside the streets over which its bridge is suspended. The situation of the plaintiff's land and double dwelling-house, of the defendant's abutments, bridge, and right of way, as now defined, and of the streets, is shown by the following diagram:*

After the overhead crossing was completed and occupied by the defendant, this suit was brought to recover consequential damages, which he alleges he has sustained by reason of the construction and use of it. The defendant denies the

* Diagram not necessary to understanding of case.—[Ed.]

right to a recovery, alleging—first, that it has taken, injured, or destroyed no portion of the plaintiff's property in the construction of its crossing; and, next, that it has a clear legal right to operate its line of road in the manner contemplated by its charter, and commonly employed by railroad companies, without liability therefor.

The first of these positions makes it necessary to inquire into the nature and extent of the title which the defendant acquired in these public streets by virtue of its charter, and the consent of the city of Scranton to construct an overhead crossing at this point. It is well understood that when the state enters upon the land of a private owner by virtue of its right of eminent domain, for the purpose of laying out a public highway, it acquires an easement in and upon the land so entered for the purpose of public travel. The injury, if any, which the owner suffers is estimated in damages, and compensation is made him. The highway so opened passes under the care of the municipal division of the estate in which it is located. The fee remains in the former owner, but is bound by the servitude which the entry by the commonwealth imposed; so that the owner cannot interfere with the free use by the public of the land appropriated to the highway; nor can he assert his title to, or exercise any control over, such land in hostility to the public use or easement. The title to the highway is in the commonwealth, as the representative of that portion of her citizens interested in its use. The duty to maintain it and to protect the public in its use rests on the municipality. The public easement is broad enough to include the various modes of travel in common use, and to admit such new and improved modes as the public may adopt; subject only to this necessary limitation, that the new modes adopted must not be destructive of, or inconsistent with the use of the highway for the purposes and in the manner for which it was intended, nor with the municipal control over it. Now, when the commonwealth authorizes the construction of a railroad upon a line which makes it necessary to cross one or more public highways, it authorizes its grantee, by a necessary implication, to enter and use such highways for such purpose. This grant is, however, subject to two limitations—one in favor of the public, as already stated, for the preservation of the way; the other in favor of the owner, which requires that no additional servitude shall be imposed upon the land covered by the public easement. If the first limitation be violated, so that the way is lost to the public, another must be provided to take its place. If the second be violated, so that the owner is subjected to new

Easement of
abutting own-
ers.

and additional burdens, he is entitled to compensation for the injury actually sustained.

It follows that the railroad company, desiring to cross the streets of a city, must apply to the city for leave, and for the conditions deemed necessary to secure the public convenience and safety. This being done, the railroad company may lawfully enter upon and cross a public highway without liability, so long as it complies with the terms imposed by the municipality, and keeps within the limits already stated. *Struthers v. Railroad Co.*, 87 Pa. St. 282; *Snyder v. Railroad Co.*, 55 Pa. St. 340; *Railroad Co. v. Speer*, 56 Pa. St. 325. If it exceeds these limits, and imposes a new servitude on the land occupied by the public easement, the owner is entitled to compensation, and, under some circumstances, may recover the land itself. In *Philips v. Railroad Co.*, 78 Pa. St. 177, the track of the railroad had been located upon a public road, and occupied it longitudinally for some considerable distance. The easement of the public for purposes of travel was thus rendered useless, and the way abandoned in consequence. A new road was built by the railroad company to take its place, which was accepted and used by the public, and the occupancy of the highway was thus settled for so far as the public was concerned. After this was done, the owner of a farm lying along one side of the road so abandoned to the railroad company brought an action of ejectment against the company to recover a strip of land representing one half of the land covered by the highway as it was opened and travelled before the railroad took possession of it. He was allowed to recover. He owned to the centre of the road, subject to the public easement. The railroad company entered under the protection of that easement, but, once in possession, its use soon became inconsistent with and destructive of the easement, so that the public was compelled to abandon it. The land was thus relieved from the burden imposed by the highway, and the owner was at liberty to assert his title against any one found in possession. But it is not necessary that the public easement should be destroyed to enable the owner to recover for an additional servitude imposed upon his land. Among the more recent of the cases in which this doctrine has been recognized and applied are *Railroad Co. v. Duncan*, 111 Pa. St. 354, 29 Am. & Eng. R. Cas. 354; *Railroad Co. v. Walsh*, 124 Pa. St. 544, 38 Am. & Eng. R. Cas. 466; *Railroad Co. v. Ziemer*, 124 Pa. St. 560. In *Walsh's Case* and in *Duncan's case* the ground of recovery was that the railroad, while wholly within a public street, was so located as to interfere with access to the plaintiff's buildings, and practically cut them off from the highway. In *Ziemer's Case*

the railroad was upon the street, but it was so constructed as to obstruct the drainage from his premises. In each case a new servitude had been imposed upon the land occupied by the street, which injuriously affected the adjacent owner, by interfering with the access to or drainage from his property; and for the injury sustained by reason of such additional servitude he was allowed to recover damages.

In the case before us we have a new state of facts. The defendant entered upon the intersection of Washington avenue and New street by virtue of the implied permission afforded by its charter, and the express permission of the city of Scranton. But, as we have seen, the permission of the city may be conditioned upon the compliance by the railroad company with such

Additional
servitude—
Bridge over
street.

terms as may be deemed necessary to protect the public in its use of the streets. A crossing at grade has come to be regarded as dangerous to the public. Municipal governments now very generally refuse permission to make them where it is reasonably practicable to make the crossing underground or overhead. In this case the city of Scranton required—at least, it authorized—the crossing by means of an overhead bridge. The street over which it had control was upon the surface, but the easement for public travel affected the underlying strata by imposing upon them a servitude of the surface for the support of the way. It affected the open space overhead by imposing a servitude for the supply of air and light to the public while using the way. The owner of the surface upon which the way was opened could neither undermine nor overhang it without municipal consent, for the servitude imposed by the existence of the highway follows his title upward and downward from the surface so far as may be necessary for the safety and convenience of the public; and the owner is precluded from the exercise of acts of ownership in hostility to or inconsistent with the servitude so imposed. The permission of the municipality to cross or enter upon one of its streets, whether upon the surface or above or below it, is an authority to the grantee to enter within the limits affected by the public easement, and is subordination to it. The grantee may lawfully enter under this permission, but his rights are subject to the same limitations that have been already pointed out. He must impose no new servitude upon the land. If he does, he takes not only what the municipality had to grant, but he takes from the owner in addition. In such case, as we have seen by the cases already cited, the owner is entitled to compensation for the new servitude to which he is subjected.

The defendant has not disturbed the public easement of

travel, for it carries its railway and its trains 23 feet above the surface of the streets ; and, so far as its bridge overhangs the way, the city has authorized it to be done. The public have therefore no ground for complaint ; but the question remains whether this overhead crossing imposes a new servitude on the surface which is injurious to the plaintiff's property ? This crossing is, in effect, a new and distinct way. It is suspended over that which the public occupy on the surface. The public has no right in it, but one who goes upon it without the consent of the defendant is a trespasser. It is built for the exclusive use of the defendant corporation in the movement of its trains by means of locomotive engines. It invades space which belongs to the plaintiff, subject to the servitude which the existence of the way upon the surface imposes. If the streets should be abandoned by the public, or vacated by a decree of the court of quarter sessions, this structure would remain unaffected thereby. The extinguishment of the public easement would remit the plaintiff to all his rights as an owner, but he could not exercise them. If he should attempt to build upon his land, the bridge would intercept his operations. These facts are not denied, and their legal value may be determined by the courts. They show the imposition of a new servitude upon the surface for the exclusive benefit of the defendant. The plaintiff's property is in the built-up part of a growing city. The possibility of the vacation of these streets may be so remote as not to be worth considering, but the extent to which the new servitude really injures the property is a question for the consideration of the jury. This brings us to the question of the measure of damages.

The plaintiff's declaration, as filed, contained two counts. One of these charged a trespass *quare clausum fregit* ; the other proceeded upon the theory that consequential damages were alone recoverable, and claimed that these were the result of the construction of the abutments, of the construction of the bridge, and of the operation of the defendant's railroad upon and over the bridge. The first count was abandoned at the trial, and the plaintiff rested his right to recover on the second. He claimed that the erection of the abutments and of the bridge excluded light and air from his premises ; that the operation of the railroad made a great noise, confusion, dust, and smoke, and exposed his premises to danger from fire, thereby affecting the comfort and security of the double dwelling-house, and that the construction and operation of the railroad over the elevated crossing obstructed the streets, and made the approach to his premises difficult and dangerous. All the ques-

Measure of
damages.

tions thus raised were allowed to go to the jury, and the verdict affords reason to think that they were all considered in making up its amount. But the abutments were not in the highway. They were built on the land of the defendant, and were lawful structures. The plaintiff may have preferred that dwellings should have been erected on these lots, and his own property may have been rendered less desirable and less valuable because of the use the defendant made of them; but the plaintiff had no cause of action on that account. So far, therefore, as the depreciation in the value of his property is due to the absence of dwellings on these lots, and to the presence of the solid stone abutments that face the double dwelling on both fronts, the jury should have been told to disregard it.

The alleged obstruction to access to the plaintiff's premises was not supported in the least degree by the evidence.

Necessary inconvenience resulting from operation of trains. There was in fact no pretence that any obstruction existed in the streets or on the surface, but it was alleged on the trial, that horses might take fright at the passage of trains over the bridge 23 feet

above the surface, and that persons who would otherwise come to the plaintiff's double dwelling with wagons or carriages might be deterred from coming by fear that their horses would be frightened by trains on the overhead crossing, and become unmanageable. This is not an obstruction to access. It is too well settled to need a citation of authorities that mere exposure to noise, smoke, dust, and the danger of horses becoming frightened by a moving train is not an actionable injury. Such an exposure is an inconvenience, and sometimes a source of danger, to all persons who live near a railroad, or who have occasion to travel along a street that is crossed by one. Such an inconvenience or danger is common to many persons, but special to none. It may be greater to those who live or do business near the line of the road, but it affects all who have occasion to come near it, or pass along it, or over or under it. It is the same in kind, though greater in degree, as the inconvenience arising from the noise, confusion, and dust incident to travel upon a paved street or a common highway. It is the necessary result of the lawful operation of a railroad, and part of the price paid by society for the increased speed and convenience in the transportation of persons and property which it affords. This subject should have been withdrawn from the jury. There was no actionable interference with access to plaintiff's property.

It is urged that the new constitution requires a different holding, and that *Railroad Co. v. Duncan*, and the cases following it, have so determined. We do not think so. The con-

stitution makes the person or corporation exercising the right of eminent domain liable to make "just compensation for property taken, injured, or destroyed by the construction or enlargement of their work." Property is "taken" by an entry upon and an appropriation of it, as in the ordinary case of location. It is "injured" by obstructing access, as in *Duncan's Case*, or drainage, as in *Ziemer's Case*. It is destroyed, although not touched directly, when the result of construction is to prevent its use, as in *Navigation Co. v. Coon*, 6 Pa. St. 379. The injury results in these cases from the construction of the works of the corporation. But in the case of a valuable country hotel, the business of which was destroyed by the change of travel from wagons to trains, as the result of the operation of a railroad, the plaintiff was held to be remediless, although the value of his property was destroyed. In many instances business has been diverted from towns and villages, and the value of property therein seriously impaired, as a result of the operation of a railroad through or near them; but the owners of such property have no cause of action against the railroad company on that account.

The expression of the chief justice in *Walsh's Case*, on which so much reliance seems to be put, was intended to express, and we think does clearly express, a very different thought. The injury complained of in that case was an obstruction in the way of access to the building. The building was upon a street corner. The tracks of the railroad were laid close to the curbstone on one of the streets on which the building fronted, and directly across the other. The defence was that the rails were laid on the same grade with the pavement, and that the pavement had been relaid with Belgian blocks between the rails and on each side of the track, so that the railroad presented no obstruction to the use of the street for carriages. We said in reply that the word "construction" included not only the movement of earth, and the laying down of rails upon a roadbed, but the character and purpose of the structure. Two parallel iron rails, in themselves considered, might present little or no obstacle in the way of access to the building; but the structure was a railroad, built for the purpose of moving trains of cars by means of locomotive engines; and whether it obstructed access or not depended, not merely on the position of the rails, but also upon the use for which they were intended. Not to take the use of the rails into consideration, the chief justice well said, would be to take too narrow a view of the constitutional provision. The business authorized by the charter of a railroad corporation is the carriage of persons and goods. The works of construction is provided for as an indispensable prelimi-

nary. A road must be built before it can be operated. The manner and the purpose of construction are to be considered in determining questions relating to damages, but in the operation of its road a company is liable only for negligence or malice. Smoke, dust, and noise are the usual, and, in the present state of knowledge on the subject, the necessary, consequences of the use of steam and the movement of trains, just as noise and dust are the consequences of the movement of drays and carts over an ordinary highway. The resulting inconvenience and discomfort are in both cases *damnum absque injuria*. Railroad Co. v. Lippincott, 116 Pa. St. 472, 30 Am. & Eng. R. Cas. 399; Railroad Co. v. Marchant, 119 Pa. St. 541, 33 Am. & Eng. R. Cas. 116.

We are thus brought to the conclusion that the plaintiff's cause of action rests on the new servitude imposed by the construction of the overhead crossing, and the damage he sustains in consequence. The company had the right, under its charter, and the municipal consent, to enter and cross the highway without liability to the plaintiff, provided it could do so without subjecting his property to any servitude which the public easement then existing did not impose. But the elevated crossing, overhanging so much of his land as is covered by the highway, does, to some extent, impose an additional servitude upon his property. While the streets remain on the surface, the use of the space above them by the defendant does not interfere with the plaintiff's use of his property that is subject to the public easement; and the probability of the vacation of the streets in the built-up part of the city is so slight as scarcely to deserve consideration. But, if this elevated crossing does to any appreciable extent exclude light and air from the double dwelling, or affect the value of his property by reason of any additional servitude imposed upon it, for the injury so sustained the plaintiff may recover, because such injury is the result of the construction of the defendant's railroad. Little need be said of the remaining assignments of error. Several of them are directed against the admission of witnesses, to speak of the value of the plaintiff's property and its depreciation.

The appellant contends that expert testimony is needed to determine the value of city property, but we have not so held.

Opinion evidence.

The value of a house or a piece of ground is a subject upon which all persons familiar with the property, who have formed an opinion, are competent to speak. The value of their opinions will depend on the extent of their familiarity with surrounding property and the prices asked and paid for; but this is for the jury to determine. Railroad Co. v. Bunnell, 81 Pa. St. 414; Curtin v. Rail-

road Co., 135 Pa. St. 20, 44 Am. & Eng. R. Cas. 130. These assignments are not sustained.

The ninth assignment is to the action of the learned judge in submitting to the jury the question whether the overhead crossing presented an actual obstruction to access to the plaintiff's property. There was no evidence of the existence of any such obstruction, unless mere exposure to the danger of horses being frightened by passing trains 23 feet above the surface of the highway was such an obstruction. As it is well settled by the cases already cited that it is not, the question should not have been submitted.

Nor was the amount of the verdict to be fixed by a comparison of the plaintiff's property before the defendant's railroad was built and after. The occupation of the corners fronting his own across Washington avenue and New street may have affected the value of his property quite seriously. So might the erection of a brewery, or a livery-stable, or a factory upon the same corners; but the plaintiff would have been without remedy. So the mere proximity of a railroad, with its burden of traffic, may render dwelling-houses less desirable, and diminish their market value, without imposing any liability on the railroad company for the loss sustained by their owners. The inquiry in this case should have been confined, as we have already seen, to the injury inflicted by means of the additional servitude imposed upon the plaintiff's property by the defendant corporation. The building of abutments on its own land imposed no servitude on that of the plaintiff. The mere proximity of its road so that the noise of passing trains could be heard, or the dust and smoke therefrom be noticeable, imposed no servitude.

The only legal ground of complaint grows out of the overhanging of so much of the land to which the plaintiff has title as is occupied at the surface by the streets. This is a new servitude, which, standing apart from all other considerations, except such as grow legitimately out of the character of the bridge, and its effect upon the plaintiff's dwelling and lot, constitutes the ground for a recovery. The question is, What has the defendant added to the public easement? What new burden has it put upon the plaintiff's property by overhanging the intersection with its bridge? The answer furnishes the correct measure of the plaintiff's injury, and of his right to compensation.

The judgment of the court below is now reversed, for the reasons given in the foregoing opinion, and a *venire facias de novo* awarded.

Occupation of Street by Railroad—Bridge Over Street—Rights of Abutting Owners—Limitation of Action.—In *Cass v. Pennsylvania Co.* (Pa., 56 A. & E. R. Cas.—48

Dec. 30, 1893.), 28 Atl. Rep. 161, it was held that a person in front of whose property a railroad company erected a bridge over a street was entitled only to permanent damages to his property, as appeared at the date of the completion of the structure; and that the limitation to such abutter's right of action for damages began to run not later than the time when the work had progressed to such an extent as to obstruct access to his property.

OMAHA & REPUBLICAN VALLEY R. CO.

v.

MOSCHEL.

(*Nebraska Supreme Court, Nov. 8, 1898.*)

Railroads in Streets—Action for Damages—Amendments to Pleadings.—The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court; and unless it is made to clearly appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defence, the supreme court will not interfere. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defence, or an additional cause of action.

Same—Limitation of Time for Bringing Action for Damages.—An action against a railroad company for damages to plaintiff's real estate, caused by the railroad company's building its tracks and operating its road across the street and on a lot lying next to plaintiff's property, must be brought within four years of the date of the construction of such railroad.

Same—Recovery for Depreciation in Value of Property.—Where a railroad company, in 1880, built its railroad track and side-tracks across a street and on a lot (owned by it) lying next to plaintiff's property, and more than four years thereafter plaintiff brought suit against the railroad company for the depreciation in value of his lot, caused by the building of such railroad and its subsequent operation, and for subsequently building and operating additional tracks across said street and lot, *held*, (1) that plaintiff in no event could recover for any depreciation in the value of his property by reason of any acts of the railroad company either in matters of construction or operation, the habitual doing or the commencement of the doing of which acts was at a date more than four years prior to the date of suit brought; (2) that the plaintiff could, and if he did or did not, within four years after the date of building of said original railroad on said lot and across said street adjacent to his property, bring suit for damages for the depreciation in value of his premises, caused by such railroad construction and operation, then every element of damages, past and future, that was or would have been properly admissible in that suit, either in matters of construction or operation, must be excluded from consideration in this case.

COMMISSIONERS' decision. Error to Gage district court.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

Rickards & Prout, for defendant in error.

RAGAN, C.—On the 5th day of December, 1889, Charles Moschel sued the Omaha & Republican Valley Railroad Company (hereinafter designated as the "Railroad Company") in the district court of Gage county ^{Case stated.} alleging his ownership of lot 6 in the city of Beatrice. That said lot had a frontage of 50 feet on Court street, the principal street of said city. That about January 7, 1880, the railroad company constructed, and has since maintained, its line of road upon lot 5, adjacent to said lot 6, and had extend its road and side-tracks upon and across said Court street, making a double track upon said lot 5, and said street in front of Moschel's building, situate on said lot 6. (Lot 5 is immediately west of lot 6, and both front south on Court street, and the railroad tracks mentioned extend north and south across Court street, and upon lot 5.) That ever since the building of said railroad the railroad company had occupied the street in front of said place of business of Moschel and said lot 5 with its tracks and side-tracks, made up its trains thereon, and interfered with the travel on said street; "and that particularly within the four years last past, and immediately preceding the commencement of this action, said railroad company had wilfully, maliciously, and wantonly, with the intent to injure plaintiff in his business and property, caused its engines and cars to be left alongside of said property of Moschel, without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property. That said property of Moschel's had been greatly damaged, and the free use and occupation of said property interfered with, and Moschel had been compelled to abandon the doing of business on said lot 6, and at a great expense to purchase other property on which to conduct his business. That said lot 6, by reason of the premises, had been greatly injured and depreciated in value for any purpose whatsoever, and Moschel prayed judgment for damages."

The answer of the railroad company admitted the construction, maintenance, and operation of its double-track railway across Court street and upon lot 5 since 1880, and alleged that it had, for due compensation paid, procured the right of way over said lot 5 before occupying it, and specifically denied all other allegations of Moschel's petition. After the evidence was all in, the railroad company requested permission to file an amendment to its answer, setting up the statute of limitations, which the court granted, and thereupon the railroad company filed the following "amendment"—in fact, an additional defence: "The defendant, in further answer to the petition of the plaintiff, * * * alleges that the cause of

action stated in the petition did not accrue within four years next preceding this action." Thereupon Moschel, by leave of the court, amended his petition by filing what his counsel called an "addenda" thereto, in words and figures as follows: "Comes now the plaintiff for their 'addenda' to the * * * petition herein filed, * * * and * * * says that on or about the first day of October, 1886, the defendant constructed a or new main line over and across the said lot 5, and only a few feet distant from the line constructed by the defendant in the early part of 1880, so that said new main line, and the operation thereof, extended along the east side and in close proximity to plaintiff's said premises, and over and across Court street, and that by reason of which said new main line of the defendant the said Court street in front of plaintiff's premises was still blockaded, the full use thereof destroyed, the travel thereon impeded, whereby the value of said plaintiff's premises was still further reduced, so that the same was not worth within \$1200 of what they were immediately preceding the construction and operation of said new main line as herein described." The railroad company excepted to the ruling of the court allowing this amendment. Moschel had a verdict and judgment, and the railroad company brings the case here.

The first error alleged is the ruling of the court in permitting Moschel to amend his petition by filing a so-called "addenda." Moschel's petition contained two causes of action, though not separately stated and numbered: "(1) The depreciation in the value of lot 6 by the construction, in 1880, by the railroad company, and its operation and maintenance since, on lot 5 and across Court street, of its railroad and said tracks. (2) That within the four years immediately preceding the bringing of this action the railroad company had wilfully, maliciously, and wantonly, with the intent to injure Moschel in his business and property, caused its engines and cars to be left alongside of said property, without reason or necessity therefor, by reason whereof said property had been greatly damaged, and the plaintiff deprived of his free use and occupation of said property." The facts stated in the "addenda" are that in October, 1886, the railroad company constructed "a second or new main line over and across said lot 5 * * * and Court street, * * * whereby the value of Moschel's premises was reduced * * * \$1200."

The facts stated in this "addenda," then, were not amendatory of either of Moschel's causes of action, but of themselves stated a separate and independent cause of action. The entire subject of permitting or refusing amendments to be made to pleadings is by law left to the sound legal discre-

tion of the trial judge; and unless it is made to clearly appear that the court has abused its discretion, or that by his ruling a party has been deprived of the opportunity to make his case or defence, the supreme court will not interfere with the action of the trial judge. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defence or an additional cause of action. If the trial court, in the case before us, had refused to permit the railroad company to file its additional defence of the statute of limitations, or had refused to permit Moschel to file his additional cause of action, we could not say that the court had abused its discretion; and we cannot say that the court erred in permitting either of the amendments to be filed. In all such cases, if a party claims himself prejudiced by the refusal of the trial court to permit an amendment, such prejudice must appear from the record. And if amendments are permitted by the trial judge during the progress of a trial before verdict or decision, and a party is prejudiced by such amendment in the making of his case or defence, he should make such prejudice appear by affidavit or otherwise to the trial judge, and then it would be his duty, on such terms as were reasonable, to either set aside the trial proceedings already had, and continue the case to a future time, or suspend the trial until such time as the party claiming to be prejudiced might, by the exercise of reasonable diligence, be prepared to make his defence or case.

Amendments
—Discretion
of court.

The next error assigned by the railroad company is the refusal of the trial court to give to the jury this instruction: "The court instructs the jury that if any damages are to be assessed in this case, no damages can be allowed for the depreciation of the value of the property in question, except such depreciation, if any, as is shown by the evidence to have resulted within and during the four years immediately prior to the commencement of this action on the 5th day of December, 1889; but for any depreciation or damage prior to said four years you can make no allowance." The refusal to give this instruction was error for the reasons: (1) The first cause of action in Moschel's petition was the alleged depreciation in value of his lot 6 by reason of the railroad company having, in 1880, constructed, and since operated, its railroad on lot 5, adjacent to Moschel's lot. The undisputed evidence in the case is that the railroad company had, prior to building its tracks on lot 5 in 1880, purchased said lot. The railroad company then was in the same situation, so far as concerns the question of damages to Moschel's property as it would have been had it acquired the right to use and occupy lot 5 by con-

Damages for
depreciation
in value of
abutting lot.

demnation proceedings; that is to say, the railroad company had not wrongfully occupied and used lot 5. It was not a trespasser, and all the damages done to Moschel's property by the location and proper, usual, ordinary, and necessary operation by the railroad company of its railroad on the lot 5 and across Court street accrued at the date of the building of the railroad in 1880, and hence was barred by the statute of limitations, and could not be recovered in this action. *Mills. Em. Dom. § 216; Railroad Co. v. Loeb*, 118 Ill. 203, 27 Am. & Eng. R. Cas. 415. (2) A very large part of Moschel's evidence was directed to the depreciation in the value of his lot, caused by the building of the railroad on lot 5, and across Court street, in 1880, and its maintenance and operation thereof since. (3) The court, at the request of Moschel, had already instructed the jury as follows: "You are instructed that if you find from the evidence in this case that the defendant constructed and operated the line of road across the lot adjoining that of plaintiff, now in question, and if you further find from such evidence that by said construction and operation of said road the lot of plaintiff was injured and decreased in value, then you should find the damages to the lot to be the amount which you may find that the evidence show that said lot was decreased in value by reason of such construction and operation." This last instruction left the jury at liberty, if it did not direct them, to take into consideration, in estimating Moschel's damages, the depreciation in value of his lot by the building of the railroad in 1880. And the language of this instruction should at least have been limited by such an instruction as the one asked by the railroad company and refused. (4) There was no evidence before the jury that would justify their finding, as Moschel alleged in one of his causes of action, that the railroad company had at any time "wilfully, maliciously, and wantonly, with the intent of injuring plaintiff in his business and property, * * * caused its engines and cars to be left alongside the property of the plaintiff without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property."

It is strenuously insisted here by counsel for the railroad company that this case is to be viewed as if Moschel had within four years after the building of the tracks across Court street and lot 5, in 1880, sued the railroad company for damages for depreciation of his property, caused by such building; and that the judgment in such a case, had it been brought, would be a bar to this action, and therefore this suit cannot be maintained. It is doubtless true—First. That in this case Moschel cannot re-

Limitation of
time for bring-
ing action.

cover for any depreciation in the value of his property by reason of any acts of the railroad company, either in matters of construction or operation, the doing and commencement of the doing of which acts was at a date more than four years prior to the date of the suit brought. Second. That the owner of said lot 6 could, and if he did or did not, within four years after the date of the building of said railroad on said lot 5 and across said Court street, bring suit for damages for the depreciation in the value of his property, caused by such construction and operation of said railroad, then every element of damages, past and future, that was or would have been properly admissible in such suit, either in matters of construction or operation, must be excluded from consideration in this case.

The judgment of the district court is reversed, and the cause remanded. The other commissioners concur.

CHICAGO, KANSAS & WESTERN R. Co.

v.

UNION INVESTMENT Co.

(*Kansas Supreme Court, June 10, 1898.*)

Railroads in Street—Easement of Abutting Owner—Obstructions.—Where a railroad company, under a city ordinance, or the statute, constructs and operates its road in a street or highway, but leaves sufficient space between the roadbed and abutting land or lots for ordinary vehicles, teams, and travel, there is no such obstruction of access to abutting land or lots as to permit damages for any depreciation in value thereof.

Same—Obstructions—Special Damages Recoverable by Abutters—Depreciation in Value of Property.—If a railroad company, in constructing its road and surfacing its track, makes holes or other temporary obstructions in a street or highway, an abutting lot or land-owner may recover all special damages suffered by him prior to the commencement of his action; but on account of such defects or obstructions in the street or highway he cannot recover for the supposed depreciation in value of his property, upon the ground of a permanent appropriation for the right of way.

ERROR from Dickinson district court.

George R. Peck, A. A. Hurd, and Robert Lunlap, for plaintiff in error.

John H. Mahan, for defendant in error.

HORTON, C.J.—In March, 1887, the Union Investment Company was the owner of a tract of land known as "Richland Park," an addition to the city of Abilene, which it had platted into lots and blocks. In June, 1887, Case stated. the Chicago, Kansas & Western Railroad Company began the

construction of its road and telegraph-line upon Third street of this addition. On the 23d of June, 1887, the Union Investment Company commenced this action to enjoin the construction of the railroad. Subsequently, and on October 15, 1888, that company filed an amended petition, claiming \$5000 damages against the railroad company for wrongfully and unnecessarily digging up the street, elevating its roadbed, and unnecessarily impairing the usefulness of the street as means of ingress and egress to the abutting lots upon which the road was constructed. Upon the trial in the case the jury returned a verdict for \$300 against the railroad company, and judgment was rendered thereon. The railroad company excepted.

Third street is eighty feet wide. The embankment for the road and tracks was placed about the centre of the street, but nearer the north half. The grade was about a foot and a half, and to the top of the rails about two feet. The distance between the embankment and the lots upon the north side was thirty feet, and from the lots on the south side to the embankment over forty feet. In surfacing up the track there were some holes dug along the sides of the street from two to four feet in width and length and about a foot deep. These holes interfered with the passing and repassing of vehicles and travel. Before the construction of the railroad the grade of the street had never been established, and the abutting lots were vacant and unimproved. The embankment and tracks for the railroad occupied about five feet. On account of the grade it was difficult to cross over the track from one side to the other, but there were good crossings at the street crossings, made by the railroad company.

The recovery in the case was solely for the depreciation in the value of the lots by alleged permanent obstructions. The

Recovery for
depreciation
in value of
lots.

instructions to the jury permitting such a recovery were misleading. Such damages cannot be sustained upon the testimony introduced. Of course, a railroad company cannot wrongfully and unnecessarily block up and obstruct a street or highway, and if a lot or land-owner receives actual injury from such obstruction, special to him, and not such as affects the public in general, he may have a cause of action. But in this case there was no permanent taking and appropriation of the whole street, or of any part of the street immediately adjoining the abutting lots, so as to completely or substantially obstruct the ingress to or egress from the lots. *Railroad Co. v. Larson*, 40 Kan. 301, 36 Am. & Eng. R. Cas. 163; *Railroad Co. Cuykendall*, 42 Kan. 234; *Railroad v. Smith*, 45 Kan. 264, 46 Am. & Eng. R. Cas. 53; *Railroad Co. v. Mahler*, 45 Kan. 565. As was said in the *Andrews Case*, 30 Kan. 590, 14 Am. & Eng. R. Cas.

248: "The public, in grading the alley, or in permitting a railroad company to occupy it, may in some cases render its use less convenient, and still not give the plaintiff any right of action against any person or corporation for damages. Thus the public may grade the alley so that it would be much above the surface of the plaintiff's lots, or much below it, and so that it would be very inconvenient for the plaintiff or others to pass from the one to the other; or the public might vacate a street at one end of the alley, so that the plaintiff could pass into the alley only at the other end, or might in other ways vacate streets or alleys so as to render the plaintiff's property less enjoyable, without giving to the plaintiff a cause of action. Numerous decisions have been made to the effect that for the construction of a railroad upon a street or alley with authority from the city, where it was restored to its former conditions, or where the structure did not deprive the owner of the reasonable use of the street or alley as a means of ingress to and egress from his lots, no recovery could be had. The fact that the street or alley may be narrowed by the structure, or made less convenient, or that by reason thereof the property would be less attractive or desirable, will create no liability against the company if the owner's special use and private right of entering and leaving his property have not been unreasonably abridged." *Railroad Co. v. Curtan*, 33 Pac. Rep. 297 (just decided); *Heller v. Railroad Co.*, 28 Kan. 625, 7 Am. & Eng. R. Cas. 636; *Railroad Co. v. Smith*, *supra*. See also *Railway Co. v. Early*, 46 Kan. 197; *Railway Co. v. Mahler*, *supra*. If the addition was not within the city of Abilene, the railroad company had the power, under the fourth subdivision of paragraph 1207, Gen. St. 1889, "to construct its road across, along, or upon any * * * street or highway * * * which the route of its road would intersect or touch, but the company would restore the * * * street or highway thus intersected or touched to its former state, or to such a state as to have not necessarily impaired its usefulness." Comp. Laws 1855, p. 218, § 47.

If there was a temporary obstruction of the street on account of the holes dug by the men in surfacing the track which were left unfinished or in a dangerous condition, and the plaintiff below had suffered any special damage or injury thereby, differing in kind from the public generally, it would be entitled to recover the special damages which had accrued prior to the commencement of this action. But the depreciation in value of the property in this case is not the damages recoverable. In other words, the plaintiff below was entitled to recover, upon the facts disclosed, if anything, only such

Easement—
Special dam-
ages.

actual damages as it suffered up to the commencement of this action. This is not like the cases where ingress to and egress from a lot or tract of land is completely or substantially destroyed by the permanent taking and appropriation of a street or alley. *Garside's Case*, 10 Kan. 552; *Twine's Case*, 23 Kan. 585; *Andrews' Case*, 26 Kan. 702, 5 Am. & Eng. R. Cas. 370; *Larson's Case*, *supra*. In *Railroad Co. v. Curtan*, 33 Pac. Rep. 297 (just decided), the obstruction of the alley was treated by all the parties as permanent. The exceptions referred to in this case were not taken in that case. See, also, *Railway Co. v. Early*, 46 Kan. 197. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

Damages for Depreciation of Value of Property.—See Note, 46 Am. & Eng. R. Cas. 51.

Lot-owner Can Recover only for Special Injuries.—See Notes, 20 Am. & Eng. R. Cas. 81; 14 *Id.* 272; 20 *Id.* 80.

Consequential Damages.—See Note, 17 Am. & Eng. R. Cas. 194; *Hot Springs R. Co. v. Williamson* (U. S.), 46 *Id.* 59.

Damages for Depreciation in Value of Abutting Lots.—In *Ottawa, O. C. & C. G. R. Co. v. Peterson* (Kan., July 8, 1898.), 38 Pac. Rep. 606, where the above case was followed, the court said: "The contention is over the damages allowed for the alleged depreciation in the value of the lots and the instructions permitting such damages. At the time of the construction of the railroad, F street, in the addition referred to, had never been graded, nor had a grade ever been established thereon. It simply was in the original condition of prairie, somewhat uneven. Among other instructions given was the following: 'The owner of a lot abutting on a street has an interest in such street which is peculiar and personal to him, and distinct and different from that of the general public, and this interest is the right to have free access over such street to his lot and buildings thereon, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be wholly taken away or materially impaired without liability to the owner to the extent of the damages peculiar and personal to the owner actually incurred thereby. In order to warrant a recovery for an invasion of such a right, it must appear that the obstruction complained of presents a physical disturbance of the right so possessed, so as to prevent its use in the manner in which it was theretofore actually or might have been used and enjoyed, and the disturbance of the right must have resulted in peculiar damage to and depreciation in the value of the property to which the right is appendant. If, therefore, you do not find from the evidence in this case that there has been such a physical disturbance by the defendant, by the location and construction of its railroad along F street in front of plaintiff's lots, of the right of access by way of such street to said lots as to wholly prevent the use of that right in the manner in which it was theretofore actually or might have been used and enjoyed, and that such disturbance resulted in peculiar damage to and depreciation of the value of said lots, then the owner cannot recover, and your verdict should be in favor of the defendant.' Even if the railroad has been skilfully and properly constructed under the provisions of a city ordinance, or if the company had restored the highway to make it passable, but had permanently obstructed

a part thereof abutting Peterson's lots, so as to permanently prevent access to and from the same, this instruction would be subject to criticism, but, under the facts disclosed in the case, we think it was erroneous. It was permissive to the jury to allow damages for the depreciation in the market value of the premises, if access to the lots had been substantially affected by the interference of the railroad with the street, although such interference caused merely a nuisance, or was temporary only, which could at any time have been easily removed or abated. Under the instruction, a recovery of permanent damages was allowable if the obstruction complained of, although temporary, and subject to immediate removal by the public authorities, presented a physical disturbance of the right of the access to and from the premises, so as to prevent its use in the manner it was theretofore actually used and enjoyed. It was decided in *Chicago, K. & W. R. Co. v. Union Inv. Co.*, 51 Kan.—56 Am. & Eng. R. Cas. 679 that "if a railroad company, in constructing its road, and surfacing its track, makes holes or other temporary obstructions in a street or highway, an abutting lot or land-owner may recover all special damages suffered by him prior to the commencement of his action, but, on account of such defects or obstructions in the street or highway, he cannot recover for the supposed depreciation in the value of his property, upon the ground of a permanent appropriation for the right of way." Upon the evidence, the railroad does not permanently diminish the value of the lots, because the improper construction of the roadbed, not being in accordance with the provisions of the statute, is a temporary wrong, liable to be removed at any time. *Attwood v. City of Bangor (Me.)*, 22 Atl. Rep. 466; *Railway Co. v. Early*, 46 Kan. 197; *Chicago, K. & W. R. Co. v. Union Inv. Co.*, *supra*.

"Of course, if Peterson has suffered an injury, not shared by the public generally, in the right of access from or to his property, he is entitled to recover full compensation therefor; but such damages to be recovered are those which accrued up to the time of the commencement of his action, not for the permanent depreciation in the value of his lots. Under the provisions of the statute, it is the duty of the railroad company to restore the street or highway to its former condition, or at least to a passable condition. The payment of damages to the plaintiff below in this action will not prevent the proper authorities from abating the nuisance caused by the railroad company, if it exists; and if abated by the public authorities, or if, at the instance of the public authorities, the street or highway is restored by the railroad company to a passable condition, it goes without saying that permanent or lasting damages ought not to be allowed. *Railway Co. v. Cuykendall*, 42 Kan. 234; *Uline v. Railroad Co.*, 101 N. Y. 98, 28 Am. & Eng. R. Cas. 3; *Railroad Co. v. Larson*, 40 Kan. 801, 36 Am. & Eng. R. Cas. 163; *Pappenheim v. Railway Co.*, 128 N. Y. 436, and 26 Amer. St. Rep. 486, and notes. In the *Twine Case*, 23 Kan. 585, the track, as completed in the narrow valley of the city of Atchison, deprived the lot-owner of all use and benefit thereof, and destroyed access to the valley. Under the license from the city to occupy the valley, the railroad company had confiscated it, and, although it was doubtful upon what cause of action the trial court allowed the damages, this court said that the lot-owner might recover, under the circumstances, for a permanent depreciation of his property. In the *Andrews Case*, 26 Kan. 702, 5 Am. & Eng. R. Cas. 370, the railroad was constructed in the usual manner, over and upon an alley of the city of Atchison, in accordance with the provisions of an ordinance of that city. The lot-owner, having brought his action for a permanent obstruction, was permitted to recover as if the alley were permanently appropriated by the railroad company for its use. In the *Fox Case*, 42 Kan. 490, 40 Am. & Eng. R. Cas. 331, the railroad company obtained consent of the city of Newton to appropriate a street in that city for railroad purposes.

The railroad was skilfully and properly constructed, but the entire street opposite the premises of Fox was rendered wholly useless as a highway, or as a means of access to and from the lots. Both the company and lot-owner in that case treated the appropriation of the street as a permanent one, and therefore damages for a permanent appropriation were allowable. In *Railroad Co. v. Curtan*, 51 Kan. —, 38 Pac. Rep. 297 (recently decided), all the parties to that action, upon the trial, treated the obstruction as a permanent appropriation of the alley or a part thereof. If the track and roadbed of a railroad is completed in accordance with the provisions of a city ordinance, or with the assent and under the direction of city officials, it may fairly be presumed that the railroad company 'considers such manner of occupation necessary for its purposes, and has so laid the track, with reference to its own necessities,' and that the city 'regards the use by the company of the alley or street so occupied as of more value to the public than the general use by the public itself, and will never interfere with such use by the company.' But where a railroad company constructs its road across, along, or upon a public highway, under the provisions of paragraph 1207, Gen. St. 1889, what constitutes a nuisance to-day in the construction of the road may cease to-morrow, because it is to be presumed that the highway officials or road overseers will perform their official duties, and require the provisions of the statute to be complied with. If Peterson, by bringing his action for a permanent appropriation, could bind the public authorities, or if the railroad company could be relieved thereby from its duty to restore the highway, then permanent damages would be allowed; but such is not the case, upon the facts presented."

HATCH *et ux.*

v.

TACOMA, OLYMPIA & GRAY'S HARBOR R. CO.

(*Washington Supreme Court, March 1, 1893.*)

Railroad in Street—Action by Abutter for Damages—Validity of Answer.—

In an action against a railroad company for injury to abutting property, it was not error to refuse the request of the plaintiff that a portion of the answer be stricken out, where the part sought to be eliminated was in effect a plea of license from the city, and was relied on by the defendant as a complete defence to the action; but the sufficiency of the answer was properly called in question by the demurrer.

Same—Grant of Franchise—Liability of Company for Injury to Abutters.—Where a railroad was constructed in a street in accordance with an ordinance of the city, passed in accordance with the provisions of its charter, the railroad company could not be relieved from liability for injury to abutting owners, on the ground that the powers granted to the city should operate as a shield against liability on the part of a grantee of a railway franchise to a lot-owner, for damages caused by the location of its railroad, where the legislature declared that no railroad track should be laid down until the injury to property abutting upon the street, upon which the track was proposed to be located, had been ascertained and compensated for.

Same—Easements of Abutting Owners.—Although it be admitted that

the fee of a street upon which a railroad is to be constructed is in the city, abutting owners may be entitled to compensation for injuries which they suffer in a manner different from that of the public generally, by the appropriation of the street for railroad purposes; and the raising of the grade of a street in front of the plaintiff's property, so as to destroy access to the same, showed a cause of action.

Same—Liability of City.—Where, in an action against a railroad company for injury to abutting property by reason of the construction of a railroad in a street, it was not shown that the city did any of the acts or things complained of, but merely enacted the ordinance granting to the defendant the privilege of using the street in the manner specified, it was error to dismiss the action for failure to make the city a party defendant.

HORT, J., *dissenting*.

APPEAL from Thurston superior court.

Allen & Ayer, for appellants.

Mitchell, Ashton & Chapman, for respondent.

ANDERS, J.—The appellants sued the respondent to recover damages alleged to have been occasioned to their property by the building and operating of a railroad along Seventh street, in the city of Olympia. The complainant alleges: “(3) That on said date plaintiffs became the owners in fee, and obtained possession, and are now such owners, and have possession, and at all times hereinafter mentioned were such owners, and had possession of that certain tract of land situate at the northeast corner of Franklin street and Seventh street, in the city of Olympia, county of Thurston, and state of Washington, known, designated, and numbered on the original plat of the town (now said city) of Olympia as lots numbered, respectively, eight (8) and seven (7) in block numbered thirty-six (36), which plat is, and for many years has been, on file in the auditor's office of said county; said lots being the southwest quarter of said block. (4) That each of said lots fronts, and is sixty (60) feet wide, on said Seventh street, and extends northward, at right angles with said street, one hundred and twenty (120) feet; the west line of said lot numbered eight (8) being on Franklin street aforesaid. (5) That plaintiffs are the owners in fee of so much of the land on which Seventh street aforesaid is located as lies on the front of, and adjacent to, said lots, and extends to the middle line of said street, and they are the owners in fee of so much of the land on which said Franklin street is located as lies on the west of, and adjacent to, lot numbered eight (8), and extends to the middle line of said Franklin street. Each of said streets is sixty (60) feet wide. (6) Plaintiffs say that heretofore, to wit, on the — day of May, 1891, and on divers and sundry days thereafter, the defendant, the Tacoma, Olympia & Gray's Harbor Railroad Company, aforesaid, its officers, agents, servants, and

employés, without the consent of these plaintiffs, or of either of them, and wrongfully and unlawfully, entered upon the land of plaintiffs on Seventh street, described in the fifth paragraph of this complaint, and without the consent of plaintiffs, or either of them, and wrongfully and unlawfully, did dig up and carry away the soil thereof, and did cut a deep tunnel along and across said land, to the full extent of the width and length of said Seventh street, in front of said lots, and greatly to plaintiffs' damage. (7) That plaintiffs' said land, described in paragraphs 3 and 4 herein, is improved property, and has thereon a valuable dwelling-house, in which plaintiffs reside, and have for several years resided, and other valuable buildings, fruit trees, and other improvements. (8) That the said defendant, its officers, agents, servants, and employés, have constructed a railway along said tunnel, and have covered said tunnel with timbers and plank for the purpose of making a roadway over said tunnel and along said Seventh street, for public travel and passage, and have wrongfully and unlawfully changed and raised the grade of said street five (5) feet above the grade that had been established theretofore on said street by the city of Olympia, and that existed at the time said tunnel was cut and made as aforesaid. (9) That said defendant, its officers, agents, servants, and employés, have wrongfully and unlawfully changed and raised the grade of Franklin street, making the approach on said street to said covered way five (5) feet at the point said street intersects with said covered way, and have wrongfully and unlawfully extended said altered grade along said Franklin street, in front of said plaintiffs' said land, buildings, and improvements. (10) That said defendant, its officers, agents, servants, and employés, by doing the acts and things alleged in paragraph 8 and 9 herein, have put and left plaintiffs' aforesaid lots, buildings, and improvements at a depth of five (5) feet below the top of said covered way on Seventh street, and at the intersection of Seventh and Franklin streets, and along Franklin street, have destroyed ingress and egress to and from said property on Seventh street, and for one-half the length thereof on Franklin street, and have thereby greatly impaired and lessened the value of said lots, buildings, and improvements. (11) That said defendant is actively engaged, through its officers, agents, employés, and servants, in operating its railroad, and in running passenger and freight trains, drawn by steam-engines, along and through said tunnel daily, and that in so doing the smoke and sparks from said engines are thrown off in said tunnel in great quantities, and the rumble and noise produced by said trains are very great, and that plaintiffs' residence and buildings aforesaid are daily

endangered and rendered unsafe and uncomfortable thereby, and the value thereof materially and greatly impaired and lessened. (12) That said defendant, its officers, agents, servants, and employes, by reason of the acts and things alleged herein, have damaged plaintiffs in the sum of five thousand (\$5000) dollars."

The respondent filed an answer admitting the construction and operating of the railroad as set forth in the complaint, but denying any knowledge or information sufficient to form a belief as to the ownership of the property described in the complaint; denying that plaintiffs are the owners of the fee to the middle line of the streets adjoining said premises; that defendant raised the grade of said streets to any extent whatever, or that it destroyed ingress or egress to and from said property on said streets, or that it thereby, or at all, has lessened or impaired the value of said lots, buildings, or improvements, or either of them; that, in running its trains along and through said tunnel, the smoke and sparks from said engines are thrown off from said tunnel, or that the rumble and noise produced by said trains are very great, or great at all, or that plaintiffs' residence or buildings are injured or rendered unsafe or uncomfortable thereby, or that any of the acts complained of were wrongfully or unlawfully done, or that plaintiffs have been damaged by any acts of defendant in any sum whatever. And, as a further answer, defendant alleged: "(1) That at all the times herein mentioned it was a railroad corporation, duly incorporated under and by virtue of the laws of the state of Washington, and that the uses and purposes of said corporation, for which it was so incorporated, and in which it is, and at all the times in said complaint mentioned was, engaged, constitute and are a public use. (2) That Seventh and Franklin streets, of the city of Olympia, are, and at all the times in said complaint mentioned were, and for upwards of twenty years immediately preceding any of the times mentioned in said complaint had been, public streets and highways of said city, and at a time many years prior to the plaintiffs', or either of them, acquiring any right or interest in and to the lots, or either of them, mentioned in said complaint, had been designated and laid down upon the original plat of said city, and donated and granted to the public forever upon said plat, designated and laid off as such, and which said plat had theretofore, to wit, at a time more than twenty years prior to any of the times mentioned in said complaint, been recorded in the office of the auditor of said Thurston county, in which said city of Olympia is and was situated. (3) That, at all the times mentioned in said complaint

Answer to
complaint.

and herein, said city of Olympia was duly incorporated as a municipal corporation under and by virtue of the laws of the then Territory of Washington. (4) That on the 10th day of June, 1890, pursuant to the powers and authority by law invested in it, and under and by virtue of the express power and authority conferred by an act of the legislature of the Territory of Washington passed and approved on the 28th day of November, 1883, entitled, 'An act to incorporate the city of Olympia,' the mayor and city council of said city of Olympia did, by an ordinance, No. 399, of said city, entitled 'An ordinance granting a right of way to the Tacoma, Olympia & Gray's Harbor Railroad Co. over certain streets, and alleys, and authority to construct a railroad and lay out depot grounds within the city of Olympia,' authorize and grant the defendant the right and privilege of constructing, equipping, maintaining, and operating its line of railway over, along, through, across, and under certain streets and alleys of the city of Olympia, and, among others, Seventh and Franklin streets aforesaid, which said grant, so conferred, was accepted by the company. (5) That under and by virtue of said ordinance, so passed, this defendant, through its proper officers and agents, did construct its line of railroad along and under Seventh street aforesaid at or about the time mentioned in said complaint, and has since the construction thereof, and pursuant to the powers in said ordinance conferred, operated, and still continues to operate and maintain, its line of railroad, which constitute the acts and things mentioned and set forth in plaintiffs' complaint, and not otherwise, and that all of said acts and doings were had and done by and with the express permission of mayor and city council of said city of Olympia, as hereinbefore set forth, and not otherwise, and that said city had and has full power and authority of law to so ordain and grant permission to this defendant so to do."

The plaintiffs moved the court to strike out all of the affirmative matter set up in the answer, for the alleged reason that the same is immaterial and irrelevant. The motion was denied, and plaintiffs excepted. Plaintiffs then demurred to the same on the ground that it did not constitute a defence to the action. The court overruled the demurrer, and plaintiffs saved an exception. The defendant thereupon moved that the city of Olympia be made a party defendant, which motion the court sustained, and subsequently made an order requiring the plaintiffs to make the city a party defendant within three days. The plaintiffs declined to comply with said order, whereupon a judgment of nonsuit was entered against them, and the action dismissed at their costs. The plaintiffs seek a reversal

of this judgment on the ground that the several rulings above mentioned were erroneous.

The first objection, that the court erred in denying appellants' motion to strike out the portion of the answer therein referred to, is not well taken. The statute provides that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any party aggrieved thereby; and matter is irrelevant which has no bearing upon the question in controversy. If an answer alleges matter as a defence which is clearly impertinent to the cause of action, it may be stricken out as irrelevant. But if there be a doubt as to the sufficiency, in law, of the pleading, or if the alleged irrelevancy requires argument to establish it, the question should not be raised by motion, but by demurrer, which is the recognized mode of questioning the legal sufficiency of pleadings. The primary object of such a motion is to eliminate irrelevant and redundant matter from a pleading, and it is always supposed that something substantial will still remain. See Bliss, Code Pl. §§ 423, 424. And if an answer, as a whole, sets up a semblance of a defence to the action, its sufficiency cannot be determined on a motion to strike it out as irrelevant. *Walter v. Fowler*, 85 N. Y. 621. In this case, the part of the answer which appellants seek to strike out is, in effect, a plea of license from the city of Olympia, and is relied on by the respondent as a complete defence to the action. It is, therefore, neither irrelevant nor immaterial, and consequently not open to the objection urged against it. But its sufficiency was properly called in question by the appellants' demurrer, which was interposed on the alleged ground that the plea constitutes no defence to this action.

It is claimed by the learned counsel for the respondent that the railroad was constructed in accordance with the ordinance of the city, and that, inasmuch as the city was empowered by its charter to authorize the building and operation of railroads in and upon its streets, such construction and operation of the road were and are lawful, and respondent is not liable to the appellants for any injury thereby done to their property. It is further insisted that, if appellants are entitled to any damages whatever, the city is liable therefor, and not the respondent. It is conceded that the city had the power to authorize the construction of the railroad on Seventh street, upon proper conditions, and it is not disputed that the railroad was constructed under authority given by the city; but it is claimed by the appellants (1) that the power vested in the city by the legislature was exceeded in the ordinance under and by virtue of which

the right to build the railroad in the street in front of appellants' premises was granted; and (2) that the authorization of the city was necessarily subject to, and limited by, section 16 of article 1 of the constitution of the state of Washington, which provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into the court for the owner," etc.

In order to determine the validity of the ordinance set forth in the answer as a defence to the action, it becomes necessary

Validity of
ordinance—
Authority of
city to grant
franchise.

to ascertain what power was conferred upon the city of Olympia by its charter in regard to the construction of railroads upon the streets and public places, as well as the provisions of the city ordinance itself. In section 10 of the charter it is provided that "the city of Olympia shall have power

* * * to authorize or prevent the location or laying down of railway tracks and street railways on all streets, alleys, and public places; and no railway track can thus be laid down until the injury to property abutting upon the street, alley, or public place upon which such track is proposed to be located and laid down has been ascertained and compensated in the manner provided for compensation of injuries arising from regrade of streets in section 113 of this act." Laws 1883, p. 109. From this provision it appears that while the legislature empowered the city to authorize the location and laying-down of railway tracks on the streets, in its discretion, it did not thereby undertake or assume that such authorization should operate as a shield against liability on the part of the grantee of such franchise to any lot-owner upon the street for damages caused by the location of a railroad thereon. This is manifest from the language used, and no other interpretation can be given to it. Indeed, when the legislature declared that no railroad track can thus be laid down until the injury to property abutting upon the street upon which such track is proposed to be located has been ascertained and compensated in a certain prescribed manner, it virtually made it the duty of the city to withhold the privilege of laying down railways in the streets until compensation is made for injuries thereby sustained by abutting owners. The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so. Nor did it undertake to confer such right in this instance, except at street-crossings and approaches thereto. The ordinance in question provided

that the railway company should construct its railroad in a cut or tunnel between certain specified streets, at its own expense, and not more than 40 feet in width at any one point, and should wall in or timber up the sides thereof in a safe and secure manner, and for the entire distance thereof, up to the grade of Seventh street, or to any grade that might be adopted by the city council, and that said company should cover said cut, and maintain the same in good condition for public travel, in such a manner as to interfere with the use of said street in the least possible degree, and that the bridge or cover over the same at Franklin street should not be more than three feet above the established grade at said point.

The respondent contends that under the issue raised by the demurrer it must be assumed that the grade of the streets was changed, if at all, only to the extent and in the manner prescribed by the ordinance, and, further, ^{Easements of} that, if the railroad was constructed as authorized ^{abutments.} by the ordinance, then the appellants' property, in legal contemplation, was not damaged, and they are entitled to no compensation, at least from the railroad company. But we are unable to accept these propositions as conclusive. Even if it be admitted, for the purposes of the demurrer, that the fee of the street is in the city, as claimed by respondent, it does not follow that the appellants have not sustained direct and immediate damage by the building of the railroad in front of their premises. In any event, if the appellants' property has been damaged in a manner different from that of the public generally by the appropriation of the street for railroad purposes, they are entitled to compensation; and damages, to be recoverable, are not confined to the land itself, but may only affect that which is incident thereto, and necessary to the use thereof. The owner of a lot on a street in a city has a right to the use of the adjoining street which is distinct from that of the public, and such right is as much property as the lot itself (*Rude v. City of St. Louis*, 93 Mo. 408; *Burkham v. Railway Co.*, 122 Ind. 344, 43 Am. & Eng. R. Cas. 143), and cannot be taken away, or injuriously effected, without compensation. It is alleged, in substance, as we have seen, in the complaint, that the respondent raised the established grade of the street in front of appellants' land five feet, and thereby destroyed access to the same, without the consent of appellants. That allegation shows a cause of action in favor of appellants, and we think that the affirmative matter demurred to in no wise constitutes a defence thereto. The grant of the city transferred no rights of the appellants to the respondent. It simply granted such rights as the city had power to confer; and it had no power, as we have already intimated, to authorize

any interference with the proprietary rights of the appellants. It follows, therefore, that the demurrer should have been sustained.

But it is urged on behalf of the respondent that, if any recovery can be had in this action, the city is the party liable, and not the railroad company. This contention cannot be sustained. It is not shown or alleged that the city did any of the acts or things of which appellants complain. It only enacted the ordinance granting the privilege to the respondent to use the street in the manner therein specified, and for that act no private action will lie. *Elliott, Roads & S. 532; Burkham v. Railway Co., supra.* And, the city not being liable to be sued for its action in permitting the respondent to construct its railroad in the streets in the manner it did, it follows that the court erred in dismissing the action for failure to make the city a party defendant.

Some other questions were raised by counsel in their briefs, which we have not deemed it necessary to consider in passing upon the issues raised by the pleadings. The judgment is reversed, and the cause remanded to the court below, with directions to sustain the demurrer to defendant's special answer.

DUNBAR, C.J., and SCOTT and STILES, JJ., concur.

HOYT, J. (*dissenting*).—I am unable to concur in the foregoing opinion. I think that, under the peculiar provisions of its charter, the city of Olympia is alone responsible to adjoining owners for damages to their property caused by the construction and operation of a railroad in the street in front thereof. Section 10 of said charter provides that no railroad shall be laid down in any of the streets of the city until such damages have been ascertained and paid, and contains an express provision that such damages shall be ascertained in the manner provided for in section 113. The provisions of said section 113 are applicable to the ascertainment of damages as between the city and the property-owner, but are entirely inapplicable as between a private corporation and such owner. It follows that, if the provisions of said sections are to be given force, there was no way provided by law by which the railroad could have proceeded to have the damages ascertained and paid before its construction, while the power of the city in that regard was ample. I see no reason whatever why these two sections cannot be given full force, and, if they can, the well-settled rule of construction makes it the duty of the courts so to do. The provisions of said sections are plain and unequiv-

ocal, and thereunder it is made the duty of the city not to allow a railroad to be constructed on any of the streets of the city until the damages have been first ascertained, and the machinery for the ascertainment of such damages is fully provided, as between the city and the adjoining owner. In view of these facts, I think it should be held that the city, in legal effect, so far as the rights of adjoining proprietors are concerned, is the agency which affects their property; that their rights must be adjusted with the city. It does not follow that the city will necessarily bear the burden of the damages which may be assessed. It has power to fully protect itself at the time it grants the right to the railroad to occupy the street. The numerous authorities cited in the opinion of the majority of the court do not seem to me to be at all applicable to the case at bar. In none of them was the question of the construction of a charter at all like this one involved. This case, to my mind, turns entirely upon the construction of the two sections of the charter above referred to; and I see no escape from the conclusion that, whenever the city passes an ordinance authorizing the use of any of its streets for railroad purposes, it becomes responsible to those owning property adjoining such streets for all damages growing out of an occupation by a private corporation in pursuance of the provisions of the ordinance granting such rights, and that under such provisions there could be no liability on the part of the corporation occupying the street, so long as it kept within the terms of the ordinance authorizing it so to do. The ordinance granting rights to the defendant in this case was therefore material; and if the pleading on the part of the defendant showed that it was acting thereunder, and in pursuance of the rights thereby granted, such pleading set up a good defence to the action. Under the circumstances of the case the city of Olympia might not have been a necessary party to the action; but no harm could result to the plaintiffs by having the whole matter adjudicated in one suit, rather than to have the question of the liability of the railroad company first determined, and then, if it was found that it was not liable, have the question of the liability of the city determined in a separate action. In my opinion the demurrer to the separate defence was rightfully overruled; no error prejudicial to the plaintiff appears in the record; and the judgment ought to be affirmed.

Railroad in Street—Obstruction of Watercourse—Flooding Lands—Liability of City.—In *Lander v. City of Bath*, 85 Me. 141, it was held that an action could not be sustained against a city for flooding the plaintiff's premises by means of an insufficient culvert along an open water-way or course under the street, where it appeared that a railroad had included that portion of the street in its location, and that the duty of maintaining

both street and culvert had passed from the city to the railroad, which built the culvert, and ever since maintained it, and that the acts complained of were those of the railroad, and not of the city.

Damages May be Recovered for Present and Prospective Injuries.—*Highland, A. & B. B. R. Co. v. Matthews* (Ala.), 50 Am. & Eng. R. Cas. 220.

D. M. OSBORNE & Co.

v.

MISSOURI PACIFIC R. CO.

(United States Supreme Court, Jan. 16, 1893.)

Railroads in Streets—Rights of Abutting Owners—Additional Servitude.—Where the statutes of a state provide for the assessment of compensation for the taking of property for public use, but not for such assessment where property has been merely damaged, an injunction will not lie in favor of an abutting owner to restrain a railroad company from constructing and operating its line in a street, the fee of which is in the municipality for the public, or in the public, although plaintiff's property may have been depreciated in value by reason of the construction and operation of the railroad, where there was no physical injury done to the property, and its possession was not disturbed, the road being constructed on the established grade in a careful and skilful manner, and in strict compliance with the requirements of the ordinance.

APPEAL from the United States Circuit Court for the eastern district of Missouri.

This was a bill filed by D. M. Osborne & Co., a corporation of the state of New York, in the Circuit Court of the United States for the eastern district of Missouri, against the Missouri Pacific Railway Company, February 16, 1887, alleging that the defendant was about to construct a track along Gratiot street, in the city of St. Louis, from its main tracks near Twenty-third street to the property of the St. Louis Wire Mill Company, near the corner of Twenty-first street, in front of a building on Gratiot and Twenty-second streets, owned and occupied by complainant, and of a vacant lot adjoining this building, which was also owned by complainant, and on which it intended to erect a building similar to the one then occupied by it; and that the track would be a permanent obstruction, and was to be laid for the private use and gain of the wire-mill. It was further averred that Gratiot street was but 24 feet in width from curb to curb; that when the proposed building was completed according to the original plan there would be no entrance to the same on any street but Gratiot street; that by reason of the railroad tracks, and the

operation of the same, complainant and the public would be prevented from using the street as allowed by law; that travel would be diverted and turned away; that it would be impossible for a wagon and team to remain on Gratiot street in front of complainant's property, while cars were being moved or might be standing on the same, and that it would not be safe to use the street by teams and wagons; "to the great, unascertainable, and irreparable damage of your orator's business." It was also alleged that the noise, smoke, and danger from fire, and from the shaking and vibration of complainant's buildings, caused and occasioned by the passage of cars and locomotives in front of complainant's premises, would render them less desirable and valuable as a place of business to complainant; that all the damage threatened to be done complainant was irreparable in its nature, and it could not be fully compensated therefor in an action at law; and that the construction and operation of the railroad track would reduce the market value of the property, and damage the same in a sum in excess of \$30,000.

The prayer for relief was that the defendant "be restrained and enjoined from commencing or carrying out the proposed construction of any railroad track or switch, or from taking possession of said Gratiot street for said purpose, or from using said Gratiot street to the exclusion of your orator and the public, and for all such other and further relief as may be necessary and proper."

On October 8, 1887, the defendant filed its amended answer, specifically denying the allegations of complainant's bill, and averred that the track was laid, before the filing of the bill, in pursuance and by authority of an ordinance of the city of St. Louis, approved February 18, 1887, which ordinance was set out in full in the answer. Exceptions and demurrer were filed by the complainant to this answer, and overruled. The opinion of the circuit court thereon will be found in 35 Fed. Rep. 84. The court held, upon the pleadings as they stood, that the complainant should be left to its remedy at law.

A replication was then filed, and the cause came on for hearing January 31, 1889. It was stipulated that the track was laid March 20, 1887, some days after the bill was filed. Evidence was given on behalf of the complainant tending to show that the existence of the railroad track on Gratiot street lessened the value of complainant's property. The court declined to go into the question of the amount of the damages, and counsel for complainant disclaimed asking in this proceeding that the court should ascertain the amount and direct its payment.

The ordinance of the city council authorizing the construc-

tion of the track provided that the privilege of using it should be extended to other railroads by connecting their tracks with the switch, and that the track might be used to transport cars to and from the property of any other person or company owning property on Gratiot street, and desiring such connection, if municipal authority and power were granted for the laying and operation of spur-tracks thereto.

There was no evidence that the track was constructed in any other than the ordinary manner upon the surface of the street, without change of grade or other disturbance; but it did not appear to have been laid for the full distance in the centre of the street, but inclined to the north, and made a curved line at the west boundary of complainant's premises. There was no evidence of improper or unskilful construction or operation of the railroad, and there was evidence that, before and after the construction, complainant used continuously, for receiving goods, the Twenty-second street entrance to its building. It was also shown that the track was used by the defendant in a reasonable and proper manner, and at reasonable hours; and there was a conflict of testimony as to whether the value of complainant's property had been enhanced or lessened by reason of the construction of the track. The court directed the bill to be dismissed without prejudice to complainant's right to sue at law for the damages which it claimed to have suffered, and a decree to that effect was accordingly entered, from which an appeal was prosecuted to this court. The opinion is reported in 37 Fed. Rep. 830.

Section 21 of article 2 of the Missouri Constitution of 1875 provides "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Section 765 of the Revised Statutes of Missouri of 1879, being one of the sections of article 2 of chapter 21, relating to railroad companies, reads: "Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power * * * to construct its road across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal which the route of its road shall intersect or touch; but the company shall restore

the stream, water-course, street, highway, plank-road, and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. Nothing herein contained shall be construed to authorize the * * * construction of any railroad not already located in, upon, or across any street in a city or road of any county, without the assent of the corporate authorities of said city, or the county court of such county."

By subdivision 11 of section 4417 of the Revised Statutes of 1879, in article 2 of chapter 89, in relation to cities, towns, and villages, it is provided that cities shall have "sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part."

P. R. Fletcher and *J. E. McKeighan*, for appellant.

John F. Dillon and *Winslow S. Pierce*, for appellee.

FULLER, J.—We assume upon this record that the complainant was an abutting owner merely, and that the fee of the street was in the municipality for the public, or in the public; that the construction of the tracks was duly authorized; that they were laid with due care and skill, and in strict accordance with the authority granted; and that the road was properly operated. And the terms of the ordinance were such in relation to other persons and companies than the mill company, and to other railroads than this, that it is not open to the objection that it empowered a construction exclusively for private use.

The contention of complainant is that it was entitled, under section 21, article 2, of the state constitution, to compensation for the damage it alleged it had sustained, and that the company should have been enjoined from the operation of its road, because such compensation had not been paid.

In *Chicago v. Taylor*, 125 U. S. 161, which was an action in trespass on the case, the provision of the constitution of the state of Illinois, adopted in 1870, that "private property shall not be taken or damaged for public use without just compensation," came under consideration in this court, and it was ruled, in concurrence with the interpretation placed upon that language by the supreme court of the state, that a recovery might be had wherever private property had sustained a substantial injury from the making and use of an improvement that was public in its character, whether the damage was the direct result of a physical invasion of the thing owned, or of the injurious disturbance of its user and enjoyment, as in a diminution of its market value. The same conclusion was

Injury to private property
—Compensation.

reached in *Rigney v. City of Chicago*, 102 Ill. 64, where, among other things, it was said: "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." Many decisions under similar constitutional provisions are to the same effect. *Reading v. Althouse*, 93 Pa. St. 400; *Railroad Co. v. Vance*, 115 Pa. St. 325; *Auman v. Railroad Co.*, 133 Pa. St. 93; *Railroad Co. v. Williamson*, 45 Ark. 429; *Railroad v. Witherow*, 82 Ala. 195; *Gottschalk v. Railroad Co.*, 14 Neb. 550, 14 Am. & Eng. R. Cas. 157; *Spencer v. Railroad Co.*, 23 W. Va. 406, 20 Am. & Eng. R. Cas. 125.

It is insisted, however, that the settled rule of decision of the highest tribunal of Missouri is that the construction and operation of a steam-railroad track in the ordinary way upon the streets of a municipality is a legitimate use of the street, and does not impose a new burden or servitude, and that the injury which owners of abutting property may suffer by reason of such construction and operation is not of a nature for which compensation is demandable under the constitutional provision in question. In *Julia Bldg. Ass'n v. Bell Telephone Co.*, 88 Mo. 258, a bill for an injunction was filed by an abutting land-owner to restrain the erection and maintenance of telephone poles and wires on the sidewalk. The bill was dismissed, and the judgment affirmed, at October term, 1885, of the supreme court, the court holding that when the public acquires a street in a city, either by condemnation, grant, or dedication, it may be applied to all purposes consistent with the proper use of a street; that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its proper use, that the abutting land-owner can complain; that the erection and maintenance of defendant's poles were a proper use of the street; that it seemed that the owner of adjoining premises could not claim compensation for damages resulting from such use; and in no event would compensation be allowed for speculative or contingent damages, although recovery could be had for injuries resulting from the unskilful and negligent conduct of the work. And it was observed in the prevailing opinion that "railroads operated by steam are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use."

The court was not unanimous, and it is said by counsel that the dissenting opinion is the better law, and that the allusion to railroads in streets was an *obiter dictum*; but in the recent case of *Henry Gauss & Sons Manuf'g Co. v. St. Louis, K. & N. W. Ry. Co.*, 113 Mo. 308, the precise question was passed upon. This was a suit to enjoin the defendant from laying a track and operating a railroad laterally along Main street, in the city of St. Louis, in front of plaintiff's property, until compensation for damage thereto should be ascertained and paid. A preliminary injunction, which was granted at the commencement of the suit, was dissolved, and the road had been built and was in use when the cause was tried. The petition charged that the plaintiff owned an entire block fronting on Main street, and had thereon a two-story and basement factory, erected for the special purpose, and adapted by its construction for use as a planing-mill, sash, door, and box factory, and was used as such; that the building fronted on Main street, and was so constructed that the only front that was adapted for receiving and shipping lumber from the street was the Main street front; that the defendant threatened and was about to occupy the street by laying and operating by steam a railway with double tracks, thereby permanently obstructing the street, and not leaving space between the tracks and the building sufficient to permit of the standing of wagons and other vehicles without constant danger of collision with engines and cars passing to and fro over the tracks, and wholly destroying the use of the street as a thoroughfare. The damage to the property as charged consisted of the prevention of the free ingress and egress to and from the street, noise and smoke, damage from fires, shaking and vibration of the building; all caused by the passage of engines and cars over the street in proximity to the premises.

The court was satisfied that the plaintiff's property had been depreciated somewhat in value by reason of the construction and operation of the railroad, and the inquiry was whether the damages thus inflicted were such as were contemplated by section 21 of article 2 of the state constitution. It was not claimed by plaintiff that there was any physical injury done to its property, or that its possession was disturbed; and it was shown that the street was dedicated without restriction to general use as a highway; that the defendant was authorized by the charter and ordinance of the city to lay its tracks along the street, and to operate thereon; and that the track was laid on the established grade of the street, and constructed in a careful and skilful manner, and in strict compliance with the re-

Facts further
considered—
Easements.

quirements of the ordinance. It was conceded by the court that every owner of a lot abutting on a public street, besides the ownership of the property itself, had rights appurtenant thereto, which formed a part of the estate, among which might be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from the property; that the interest of the lot-owner in the adjacent street was a peculiar interest, which neither the local nor the general public could pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous ground; an incidental title to certain facilities and franchises which was in the nature of property, and which could no more be appropriated against the owner's will than any tangible property of which he might be the owner. And it was held that depriving the owner of these incorporeal hereditaments by interfering with their full enjoyment in the appropriation of the street to a new and different public use than that originally contemplated would undoubtedly be a damage within the constitutional provision; but the court was of opinion that the laying of a railroad track in the street, on grade, and operating the road in the usual manner, was not applying the street to a new public use which required the payment of compensation for damage to the property; that when land is dedicated generally, and without restrictions, or condemned for a public street in a town or city, the owner of the abutting lots who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property-rights subject to all the uses to which the street could be lawfully subjected by the public; and, after quoting with approval from the majority opinion in *Julia Bldg. Ass'n v. Bell Telephone Co.*, the court said: "There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade, and operating a steam railroad thereon, in the transaction of commercial business, along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes. *Lackland v. Railroad Co.*, 31 Mo. 180; *Porter v. Railway Co.*, 33 Mo. 128; *Cross v. Railway Co.*, 77 Mo. 321, 14 Am. & Eng. R. Cas. 123; *Julia Bldg. Ass'n Case*, *supra*; *Smith v. Railway*, 98 Mo. 24; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97 Mo. 469; *Rude v. City of St. Louis*, 93 Mo. 414. * * * It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public,

shown by it, consisted in the interference with its free access from the street to its factory ; the obstruction of the light and air across the open street ; smoke, cinders, and dust from engine and cars ; noise and jarring of the ground,—all caused by the movement of trains. These may cause damage to, and depreciation of, the value of the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiff as a probable use when it bought its property and erected its improvements." And it was concluded that, while for any damages that might be caused by the unlawful or negligent maintenance of the tracks in the street, or by negligent use of engines or movement of trains, defendant would be liable in an action to recover them, plaintiff had shown no ground for injunction. This decision, although rendered some years after the entry of the decree under review, must be regarded as an authoritative exposition of the previous judgments of that court upon the same subject.

As a general rule, this court follows the decisions of the highest tribunals of a state, upon the construction of its constitution and laws, if they do not conflict with or impair the efficacy of some provision of the federal constitution, or of a federal statute ; but we are not required to express an opinion as to the applicability of that rule in this case, as the decree must be affirmed on other grounds.

Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character, or irreparable in its nature ; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*.

Eminent domain—Equity.

In *McElroy v. Kansas City*, 21 Fed. Rep. 257, 6 Am. & Eng. Corp. Cas. 8, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice BREWER, then circuit judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the pub-

lic would suffer large inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition, while not restraining defendant from the exercise of its ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would sustain, upon payment of which the injunction would be vacated.

Assuming, as the circuit court did, and as we prefer to do in disposing of the case upon this record, that, if the complainant had sustained damages, it had a cause of action, we nevertheless entirely agree that the bill was properly dismissed.

Evidence was adduced of the extent and character of the alleged damage, although the circuit court did not undertake to go into the question of amount, and the result was that the court concluded that the use of the track had not seriously obstructed, and would not in future seriously obstruct, access to complainant's premises, and that the lessening of the market or rental value of the property was, in any event, small; that a jury might find that no damage had been sustained, or that it was inconsiderable; and that there was no proceeding which defendant could take to obtain an assessment of damages, if any, while the complainant had an adequate and simple remedy by an action at law.

The prayer was for an unconditional injunction, and, although this was coupled with a prayer for general relief, a decree different from that specifically prayed could hardly have been awarded under the general prayer, as the averments of the bill were not introduced for that purpose, and besides, the complainant explicitly disclaimed upon the hearing any desire for the ascertainment of damages in this proceeding.

The statutes of Missouri provided for the assessment of compensation for the taking of property for public use, but

not for such assessment where property was merely damaged, and complainant occupied the position of seeking by an absolute injunction to compel the defendant to pay such amount as accorded with its own judgment upon that matter. It may be that, if this had been a case where compensation as such was demandable, the defendant, by filing a cross-bill, could have obtained an order such as was entered in *McElroy v. Kansas City*, but it is useless to indulge in speculation in this regard.

We are satisfied that complainant was not entitled to the relief prayed, and the decree of the circuit court is accordingly affirmed.

Right of Abutting Owners to Compensation for Occupation of Streets by Steam Railroads.—See *Forbes v. Rome, W. & O. R. Co.* (N. Y.), 43 Am. & Eng. R. Cas. 187; *Jackson v. Chicago, S. F. & C. R. Co.* (C. C.), 43 *Id.* 145; *Trustees v. Milwaukee & L. W. R. Co.* (Wis.), 43 *Id.* 129; *McQuaid v. Portland & V. R. Co.* (Oreg.), 40 *Id.* 308; note, 40 *Id.* 320.

Railroads in Street—Rights of Abutters—Easement of Access, Light, and Air.—In *Henderson Belt R. Co. v. Dechamp* (Ky., Jan. 6, 1894.), 24 S. W. Rep. 605, it was held that a property-owner's easement of access, and immunity from smoke and falling cinders, are personal rights; and he may recover damages for an injury thereto by a railroad company, although it is authorized by the city to build its road upon the street. The court, referring to cases cited in the opinion, remarked: "In the first-named case, the jury were told to find for the appellees if they believed from the evidence that the abutting property had been damaged by reason of the cut made by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house, or from the vibrations or concussions of the running trains, but for a diminution of the value of the property, if any, caused by, or resulting from, a mere dislike of residing near a railroad, or smoke, cinders, and soot as would fall on the property by reason of currents of wind, they were to allow no damage. If the smoke or cinders would not fall on the property, except by the force of the wind, the jury were told that such damage was necessarily unavoidable in the operation of railroads, and for which the law allows no recovery. In the second-named case, the jury were told to find for the appellee, Schlamp, if his property had been rendered permanently less valuable by reason of being less accessible because of the fills and excavations made in front on the streets, and that for a diminution in value, if any, caused by a mere dislike of residing near a railroad, they were to allow no damages. The damage recoverable under these instructions was the direct and proximate result of the appellant's wrongdoing, and the act was not rendered less hurtful to the appellees if authorized by the council. The municipal authorities could not transfer rights which the municipality did not possess, and the easement of access, and immunity from falling soot and smoke directly from the engines of the company, were private rights, entirely distinct from those of the public, and did not pass under the grant of the council; and for an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities. *Elliot, Roads & S.* 532; *Railroad Company v. Combs*, 10 Bush, 382."

Eminent Domain—Additional Servitude.—In *H. Gauss & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308, it was held that the construc-

tion and operation of a railroad at grade in a public street under municipal authority is not an additional servitude, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the constitution. The court said: "The vital question in this case we do not think turns upon the character of the rights of plaintiff which were interfered with, but whether there was an interference at all. In other words, the question is whether laying the railroad track in the street on grade, under municipal authority, and operating the road in the usual manner, was applying the street to a new public use, which required the payment of compensation for damages to the property, or whether doing so was merely exercising by authority a right which had resided with the public since the dedication of the land to public uses. When land is dedicated generally, and without restrictions, or condemned, for a public street in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. Judge NORTON, expressing the opinion of a majority of this court in a recent case, says: 'I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, either by condemnation, grant, or dedication, it may be applied to all uses consistent with, and not subversive of, the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant, or condemnation; and that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street, that the abutting owner can complain.' *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 278. There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade, and operating a steam railroad thereon, in the transaction of commercial business, along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes. *Lackland v. Railroad Co.*, 31 Mo. 180; *Porter v. Railway Co.*, 33 Mo. 128; *Cross v. Railway Co.*, 77 Mo. 321; 14 Am. & Eng. R. Cas. 128; *Julia Bldg. Ass'n Case*, *supra*; *Smith v. Railway Co.*, 98 Mo. 24; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97 Mo. 469; *Rude v. City of St. Louis*, 93 Mo. 414. In the early case of *Porter v. Railway Co.*, *supra*, Judge BATES says: 'Upon deliberation, we think that the use of a street for purposes of a railroad, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes, and was authorized by the general assembly in the charter of the defendant. The damage to the plaintiff's property, resulting from such obstruction, was *damnum absque injuria*.' Judge HENRY, in *Cross v. Railway Co.*, *supra*, says: 'Conceding the right to lay the track in the street, and its proper construction at the grade of the street, the company was not liable for any inconvenience to property-holders resulting from a proper and prudent operation of the road.' Judge NORTON recognized the rule in the *Julia Bldg. Ass'n Case*, *supra*; Judge BLACK in the *Rude Case*, *supra*; Judge BARCLAY in *Smith v. Railway Co.*, *supra*—in opinions written by them respectively, and Judge BRACE, in *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97

Mo. 469, after stating that the only damage suggested by the lot-owner from the use of the street by the railroad is that resulting from the movement of trains, and the occupation of space on the street in doing so, says: 'But, that space being in a public street, the defendant's tracks having been authorized to be laid by the city, its use by the defendant for the purpose of passing to and fro over it with trains is a legitimate use belonging to the defendant company, as well as the plaintiff, in common with every other citizen desirous of passing over it with vehicles.' These decisions from our own court show that the doctrine is firmly established in the jurisprudence of this state, and there is no occasion for an examination or review of the decisions of other states which hold to the contrary. It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public, shown by it, consisted in the interference with its free access from the street to its factory; the obstruction of the light and air across the open street; smoke, cinders, and dust from engine and cars; noise and jarring of the ground—all caused by the movement of trains. These may cause damage to and depreciation of the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiff as a probable use when they bought their property and erected their improvements. *Cross v. Railway Co.*, *supra*; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, *supra*. The public use was fixed when the street was granted or dedicated. The license granted by the city to the defendant to lay its tracks upon the streets, and run engines and cars thereon in the transportation of passengers and property, was not a rededication to a new and distinct public use, but was a mere license to use it in a way contemplated by the owner of the land when he subjected it to such uses. The lots were purchased, held, and improved, not only in view of the advantages of the street, but also subject to the burdens of all consistent public uses which the increasing wants of the public might thereafter demand."

Abutting Owner having Title to Centre of Street—Right to Compensation.—In *Taylor v. Chicago, M. & St. P. R. Co.*, 81 Wis. 82, it was held that a lot-owner who also owns the fee to the centre of the street, subject only to the right of way in the public, has such an interest in the street as will support a proceeding to recover from a railroad company compensation for taking his property for public use.

Measure of Damages—Opinion Evidence.—In *New Mexican R. Co. v. Hendricks* (New Mex., Aug. 24, 1892.), 30 Pac. Rep. 901, it was held that, on an issue as to the damages accruing to an abutting property-owner from the building of a railroad on a street, the evidence should be as to the value of the property before and after the road's construction, and that it was error to allow a witness to state what, in his opinion, was the amount of damage to the property caused by the construction of the road.

Method of Assessing Damages.—In *New Mexican R. Co. v. Hendricks*, (New Mex., Aug. 24, 1892.), 30 Pac. Rep. 901, it was held that the occupation of a street or highway by a railroad is not such a taking as will authorize a proceeding under Comp. Laws, § 2667, providing the method of assessing damages for "land, water, timber, stone, gravel, or other material" taken by a railroad.

Diversion of Street—Damages to Abutting Owners.—In *New Mexican R. Co. v. Hendricks* (New Mex., Aug. 24, 1892.), 30 Pac. Rep. 901, it was held that the statute authorizing the construction of railroads along any street, avenue, or highway, does not deprive an abutting owner of the right to damages for such diversion of the street from its original purpose.

Recovery of Damages—Speculative Damages.—In *Henderson Belt R. Co. v. Dechamp* (Ky., Jan. 6, 1894.), 24 S. W. Rep. 605, it was held that where a city ordinance accepted by a railroad company authorized the construction

its road upon the streets, and provided that it should pay to any person or property-owner "all" damages they might sustain, and that it should indemnify the city for any liability direct or remote, it might incur from the granting of the right of way, the damages recoverable by a property-owner were those fixed by the established rules of law, and did not include remote and speculative damages.

WHITE

v.

NORTHWESTERN NORTH CAROLINA R. CO.

(*North Carolina Supreme Court, December 5, 1893.*)

Railroad in Street—Rights of Abutting Owner.—The use of a street for the operation of a steam railroad is a perversion of the street from its original and proper public purposes, imposing a new and additional burden, for which the abutting owner is entitled to compensation, whether the fee of the street is in the city or in the abutting owners.

Same—Statutory Remedy—Action for Damages.—Where the railroad company did not enter upon the street under statutory authority, but under the unauthorized license of the city, the abutter was not confined to statutory remedy, but could maintain an action at law for damages.

APPEAL from Forsyth superior court.

E. B. Jones, for appellant.

Glenn & Manly, for appellee.

SHEPHERD, C.J.—The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries Case stated. to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street. It appears from the complaint that prior to the plaintiff's purchase of the property, in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally, who owned property north of Liberty street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property 223 feet in length, and 35 or 40 feet in depth and width, and thereby reduced the width of the street from 30 to 18 feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that, in order to sustain the width of the same 15 to 18 feet, the defendant has put in pillars or posts to hold and retain the earth com-

posing the street in position, which plaintiff alleges is insecure and unsafe, and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant the street at certain points along the line of plaintiff's property is almost entirely destroyed, and that plaintiff is greatly endamaged.

These allegations, extracted from the complaint, must, for the purposes of the appeal, be taken as true, as no evidence seems to have been introduced on the trial; and his honor rejected the issue as to the alleged damages sustained by the plaintiff on the ground that the defendant "had a license from the city to construct its road, and use the street if necessary." The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether such abutting owner has any proprietary rights, for the violation of which she can maintain an action. It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil, or simply an easement therein. In the absence of evidence, however, the presumption is that the city has an easement only, and that the fee remains in the abutting proprietor. *Elliott, Roads & S.* 110; *Rich v. City of Minneapolis*, 37 Minn. 423, 3 Kent, Comm. 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the street of which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only." *Lewis Em. Dom.* 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes, it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question, never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion, and not a little conflict of judicial decision, upon this subject; but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. Judge DILLON, after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be

Use of street
for steam rail-
road.

constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." 2 Dill. Mun. Corp. 725. In *Mills on Eminent Domain* (section 204) the same doctrine is laid down, and it is said: "The legislature may authorize the use of a street by the railroad, so as to make the entry lawful; but the use is an additional burden, and the right will not become fixed in the company until compensation is made. If no remedy is provided, there is remaining the remedy at common law." In *Lewis on Eminent Domain* (section 111) the able and discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks, which would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence."

In *Elliott on Roads and Streets* (page 528) the author cites many authorities, and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden," for which the abutter is entitled to compensation. In support of his proposition he quotes the following language of Judge COOLEY: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it, and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be spe-

cially injurious." Const. Lim. (3d ed.) 683. In Hare, Const. Law, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial, as regards the principle, whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street; if it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is, therefore, to impose an additional burden upon the land, which greatly impairs its value, considered as a whole; and if the owner is not compensated his consent must be proved. It cannot be said with truth that in assenting to the laying out of the highway upon his land he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the price; while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it be justly contended that a railway is merely an improved highway. * * * Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the exercise of the right of eminent domain) rely upon a grant from the legislature and the license or consent of the municipality as a justification." Booth, in his work on Street Railways (section 78), after stating that in the early history of commercial railroads the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text-writers, rather than attempt a review of the numerous decisions upon which they are founded. These decisions and others we could cite fully establish, upon principle and by weight of authority, the proposition that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully con-

structed and operated thereon against his will, and without compensation. *Railroad Co. v. Heisel*, 47 Mich. 393, 10 Am. & Eng. R. Cas. 260; *Railroad Co. v. Reed*, 41 Cal. 256; *Imlay v. Railroad Co.*, 26 Conn. 249; *Railroad Co. v. Steiner*, 44 Ga. 546; *Daly v. Railroad Co.*, 80 Ga. 793, 36 Am. & Eng. R. Cas. 20; *Cox v. Railroad Co.*, 48 Ind. 178; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Hartley*, 67 Ill. 439; *Phipps v. Railroad Co.*, 66 Md. 319; *Springfield v. Railroad Co.*, 4 Cush. 63; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Railroad Co. v. Ingalls*, 15 Neb. 123, 20 Am. & Eng. R. Cas. 60; *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Ford v. Railroad Co.*, 14 Wis. 609; *Carl v. Railroad Co.*, 46 Wis. 625; *Buckner v. Railroad Co.*, 60 Wis. 264, 14 Am. & Eng. R. Cas. 447; *Railroad Co. v. McAhren*, 12 Ind. 552; *Theobald v. Railroad Co.*, 66 Miss. 279, 38 Am. & Eng. R. Cas. 462; *Barney v. Keokuk*, 94 U. S. 324; *Adams v. Railroad Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 7.

The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true, as to the damage inflicted upon her property, very plainly has a cause of action against the defendant. If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and if it should appear upon another trial that the city has acquired it either by dedication, grant, or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights," which cannot be impaired or destroyed except under the exercise of the right of eminent domain. Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal

Question not
affected by
title to fee.

corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a contract, under which two coexistent and inviolable rights are created—one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis (Em. Dom. § 114): "To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud, which the law will neither impute nor allow. Therefore, in the case of such a grant there arises by operation of law a private right to use the street in connection with the lot of the proprietor, which is as inviolable as any other right of property."

So, if the city acquire the land by condemnation, such advantages or benefits to the adjoining property are usually assessed at a fixed value, and deducted from the estimated damages; and it would, says the above author, be "the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid, or of an assessment of benefits, unless those advantages are secured to him by a clear title. * * * The existence of these private rights and easements is strictly independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the court of appeals of New York in *Story v. Railroad Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, and *Lahr v. Railroad Co.*, 104 N. Y. 268. These cases have been followed by subsequent decisions of other states, and their doctrine has been approved by the most prominent writers upon the subject. The opinions are very elaborate, and we cannot do better than to adopt Judge DILLON's summary of some of the principles enunciated: "These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public,—that is, to the

paramount rights of the public for street uses proper,—or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. * * * If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee,—the soil of the street being the servient, the abutting owner's lot being the dominant, tenement. Among the most important of such rights or easements is the abutter's right to access, to light, and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on condition of making compensation to the abutting owner for the damage which his property actually sustained." "The result of the author's reflections upon this subject is that the views of the court of appeals are sound and just,—sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in their nature which he is not called upon unequally to sacrifice without compensation for the public use. In effect, the court says the just and true doctrine is, 'Take, but pay.' " 1 Hare, Const. Law, 370, 375; Lewis Em. Dom. §§ 114, 115; Booth St. Ry. Law, § 81; Barney v. Keokuk, *supra*; Railroad Co. v. Schurmeir, 7 Wall. 272; 1 Ror. R. R. 524; Story v. Railroad Co., *supra*; Haynes v. Thomas, 7 Ind. 38; Railroad Co. v. Steiner, 44 Ga. 546; Theobald v. Railroad Co., *supra*. The contrary view, laid down in Wood's Railway Law (volume 2, p. 727), seems to be based upon the restricted interpretation of the word "taken;" it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character, and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in Staton v. Railroad Co. 111 N. C. 278, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the

more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision. *Lewis*, Em. Dom. 58; *Pumpelly v. Green Bay Co.*, 12 Wall. 166; *Eaton v. Railroad Co.*, 51 N. H. 504.

The result of the numerous authorities is that in either view of the case—that is, whether the fee is in the plaintiff or in the city—the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the legislature, without compensation. If her property is in any way injured by the

Proprietary
rights of abut-
ters.

use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured, and its value impaired, she may maintain an action, and recover such damages as she may have sustained. These proprietary rights in the use of the street for proper public purposes are practically, as we have seen, the same irrespective of the ownership of the soil, and are not confined to the mere right of access, since this may not be disturbed although the street may be reduced in width to 10 or 15 feet. This view is well sustained in the leading case of *Adams v. Railroad Co.* (Minn.), 39 N. W. 629, 36 Am. & Eng. R. Cas. 7, in which the court said: "Take a case in one of the states where the fee of the street is in the state or municipality, and of a street 60 feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to the width of 10 or 15 feet, would it be an answer to objection by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this court in *Moose v. Carson*, 104 N. C. 431, and cannot be regarded as an open question. See, also, *Haynes v. Thomas*, *supra*. If, then, the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover. It will be observed that the defendant did not introduce its charter, or show that it had condemned any part of the street or the rights of easement of the abutting proprietor. It justifies its conduct solely upon the mere license

of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. If this be so, the plaintiff may maintain a common-law action for damages to be assessed up to the time of the trial; or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street.

Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy; but, as it does not appear to have entered under any other authority than the bare unauthorized license of the city, and as the ruling of the court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury. As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion.

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— as to other fires at other times admissible as tending to prove possibility that some locomotive caused the fire, and that there was negligence. *Northern Pacific R. Co. v. Lewis (U. S.)*, 86.

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troit & C. G. T. J. R. Co.
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much of street as might be necessary, cannot restrain another company from constructing track on remaining portion. *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.* (Pa.), 610.

Exclusive use of street; grant of right to select route, with authority to construct railroad to and through a city, and to occupy so much of specified streets as may be necessary, does not give exclusive right to occupation of streets designated. *Pennsylvania & V. R. Co. v. Philadelphia & R. R. Co.* (Pa.), 610.

Franchise to construct and operate railroad in street cannot be arbitrarily revoked where city has acquiesced in failure of railroad company to observe specifications in ordinance. *Seattle v. Columbus & P. S. R. Co.* (Wash.), 618.

— to construct railroad upon street cannot be arbitrarily revoked by a city, notwithstanding line was not completed within specified time where road was subsequently appropriated for several years. *Seattle v. Columbus & P. S. R. Co.* (Wash.), 618.

Grade of street-crossing cannot be raised by city so as to absolutely prevent railroad from maintaining track across such street, under franchise previously granted. *Seattle v. Columbus & P. S. R. Co.* (Wash.), 618.

Grant by city of right of way through streets located upon tide-land; validity of ordinance not affected by reason of title to such lands being held in trust for future state. *City of Seattle v. Columbus & P. S. R. Co.* (Wash.), 618.

Grant of franchise to railroad company provisional, unless limited in grant. *Seattle v. Columbus & P. S. R. Co.* (Wash.), 618.

Grant of right to use streets necessary for construction of track, sidings, etc., does not give exclusive right to occupy streets designated where whole width of street is not reasonably neces-

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sary. *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.* (Pa.), 610.

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Action for damages where access to business stand is obstructed; prospective advantage to abutting owner cannot be set off against the business. *Harvey v. Georgia Southern & F. R. Co.* (Ga.), 680.

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Additional burden from use of street for steam railroad; abutting owner entitled to compensation, although fee of street is in city. *White v. Northwestern N. Car. R. Co.* (N. Car.), 706.

Bridge over street held to impose new servitude, for which owner of fee might recover. *Jones v. Erie & W. V. R. Co.* (Pa.), 664.

— Necessary inconveniences resulting from operation of trains held to be *damnum absque injuria*. *Jones v. Erie & W. V. R. Co.* (Pa.) 664.

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— Company performing duty imposed by law not liable to abutters for damages. *Rauenstein v. New York, L. & W. R. Co.* (N. Y.), 655.

City granting right to use street not a proper party defendant to action against railroad. *Hatch v. Tacoma, O. & G. H. R. Co.* (Wash.), 684.

Damages. Consequential damages not allowed on account of abutments of railroad bridge built over street. *Jones v. Erie & W. V. R. Co.* (Pa.), 664.

— for past and future injuries; elements of, after expiration of limitation period, excluded from consideration. *Omaha & R. V. R. Co. v. Moschel* (Neb.), 674.

— Business stand abutting upon alley may sustain special damages by the construction and operation of railroad, by reason of access being denied to customers. *Harvey v. Georgia Southern & F. R. Co.* (Ga.), 680.

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Easement of abutting owner; railroad company liable for destruction of, though licensed by city to use street. *Leavenworth, N. & S. R. Co. v. Curtan* (Kan.), 686.

— lot-owners entitled to damages for obstruction of access to premises, though no part of same has been taken for railroad purposes. *Leavenworth, N. & S. R. Co. v. Curtan* (Kan.), 686.

Fee of street in abutting owners. Company liable for damages, although caused by acts authorized by statute. *Egbert v. Lake Shore & M. S. R. Co.* (Ind.), 648.

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cial injuries. *Hatch v. Tacoma, O. & G. H. R. Co.* (Wash.), 684.

Franchise from city does not shield company against liability for damages to abutting owners. *Hatch v. Tacoma, O. & G. H. R. Co.* (Wash.), 684.

Grant of right of way through land not a release from damages for occupation of street. *Egbert v. Lake Shore & M. S. R. Co.* (Ind.), 648.

Injunction held not to lie to restrain company from constructing road in street where no physical injury was done to abutter's property. *D. M. Osborne v. Missouri Pac. R. Co.* (U. S.), 694.

Limitation of time for bringing action for damages caused by tracks in street. *Omaha & R. V. R. Co. v. Moschel* (Neb.), 674.

Obstruction of access so as to permit damages to be recovered does not occur where sufficient space for vehicles is left. *Chicago, K. & W. R. Co. v. Union I. Co.* (Kan.), 679.

Obstructions; abutter may recover all special damages suffered prior to commencement of action, but cannot recover for supposed depreciation of property upon grounds of permanent appropriation. *Chicago, K. & W. R. Co. v. Union I. Co.* (Kan.), 679.

— Permanent obstructions to alley by railroad constructed in street. *Leavenworth, N. & S. R. Co. v. Curtan* (Kan.), 686.

— to alley by reason of construction and operation of railroad; special damage to business-stand. *Harvey v. Georgia Southern & F. R. Co.* (Ga.), 680.

— to alley by railroad in street; increase of value of abutting property cannot be set off by injuries to business. *Harvey v. Georgia Southern & F. R. Co.* (Ga.), 680.

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to, but entitled to maintain action at law. *White v. Northwestern N. Car. R. Co.* (N. Car.), 706.

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Abandonment of right to use street cannot be inferred from fact that company has made but limited use of street during time within which contract with city compels new tracks to be laid and new motive power to be used. *Citizens' St. R. Co. v. Memphis* (C. C.), 885.

Abandonment of right to use street; clear intention must appear. *Citizens' St. R. Co. v. Memphis* (C. C.), 885.

Assignee of franchises assumes duty of assignor. *Potwin Place v. Topeka R. Co.* (Kan.), 549.

Authority to extend lines to portion of certain streets lying "between" Montgomery street and "Germantown road" does not allow an extension along the Germantown road. *City of Philadelphia v. Citizens' Pass. R. Co.* (Pa.), 508.

Breach of contract to construct street railway to certain building lots; measure of damages is difference in value of land without road on days same would have been completed according to contract and what its value would have been with road completed. *Blagen v. Thompson* (Oreg.), 580.

City council is trustee in control of streets for benefit of public, and *ultra vires* contract of former council may be repudiated in the interest of the public. *City of Detroit v. Detroit City R. Co.* (C. C.), 887.

City cannot usurp state power of creating franchises or taking them away. *Citizens' St. R. Co. v. Memphis* (C. C.), 885.

City has no power "to direct and control" the location of railway tracks in cases where streets are already burdened to extent that natural justice will allow, until right of way has been condemned. *Dooly v. Salt Lake Rap. T. Co.* (Utah), 518.

City not estopped from denying

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validity of ordinance granting extension of time for occupation of streets, by reason of fact that company had relied upon contract provision of said ordinance with references to taxes. *Detroit v. Detroit City R. Co. (C. C.), 837.*

Company duly organized cannot be deprived of its rights to use streets of a city, unless by its own consent. *Citizens' St. R. Co. v. Memphis (C. C.), 835.*

Condemnation of right of way required before street railway may be constructed. *Dooly v. Salt Lake Rap. T. Co. (Utah), 518.*

Consequential damages for breach of contract to construct street railway to certain building-lots. *Blagen v. Thompson (Oreg.), 580.*

Consolidated company retains right to use street granted by original charters of consolidating companies. *Citizens' St. R. Co. v. City of Memphis (C. C.), 835.*

Corporate contract not construed as part of individual contract by stockholders, so as to make such stockholders liable for the default of their corporation. *Blagen v. Thompson (Oreg.), 580.*

Damages for breach of contract to construct railway into certain building-lots; consequential damages may be recovered. *Blagen v. Thompson (Oreg.), 580.*

Equitable relief to city from consequences of invalid ordinance extending right of street-railway corporation to occupy a street for a period of time extending beyond limit of its corporate existence; subsequent ordinance fixing proper time for occupation of street was valid. *Detroit v. Detroit City R. Co. (C. C.), 837.*

Exclusive power of city "to permit, allow, and regulate the laying-down of tracks for street cars" does not authorize grant of exclusive franchise in occupation of streets. *Parkhurst v. Salem (Oreg.), 455.*

Exclusive privileges; contract

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protected by federal constitution. *Citizens' St. R. Co. v. City R. Co. (C. C.), 415.*

Exclusive privileges. Power of city to grant exclusive franchise to street railway companies. *Parkhurst v. Salem (Oreg.), 455.*

Extensions; consent of municipal council required by company's charter; effect of supplements to characters which are silent as to requiring such consent. *Philadelphia v. Citizens' Pass. R. Co. (Pa.), 503.*

— strict construction of charter authorizing extension of railway lines. *Philadelphia v. Citizens' Pass. R. Co. (Pa.), 503.*

Federal jurisdiction of bill in equity to prevent city from granting railway privileges to competing lines; sufficiency of complaint. *Citizens' St. R. Co. v. City R. Co. (C. C.), 415.*

Grant of "railroad" privileges, such as condemnation of lands and taking of railroad by the state does not preclude street-railway privileges. *Paterson R. Co. v. Grundy (N. J.), 498.*

Indefinite grant of franchise to occupy street; rights of company subsequently formed to occupy same street under definite grant. *Junction Pass. R. Co. v. Williamsport Pass. R. Co. (Pa.), 462.*

Indefinite location by public fixed and definite only so far as grantee has made selection of streets and is actually occupying them. *Junction Pass. R. Co. v. Williamsport Pass. R. Co. (Pa.), 462.*

Investment in street-railway enterprises; adventurers bound to know statutory powers under which city council acts. City of *Detroit v. Detroit City R. Co. (C. C.), 837.*

Irrevocable easements for any stated length of time cannot be granted to a street-railway company, under the general power of a municipality to permit railways to be laid in streets. City of *Detroit v. Detroit City R. Co. (C. C.), 837.*

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Municipal control of street railways; right of city to regulate and control use of streets not enlarged into power of prohibition. *Citizens' St. R. Co. v. City of Memphis (C. C.),* 385.

Municipality cannot, under its general power respecting street railways, grant a right to occupy streets for a period extending beyond the corporate life of the company. *City of Detroit v. Detroit City R. Co. (C. C.),* 337.

Nuisance in continuing railway tracks in streets after time limited in ordinance; injunction to restrain same. *Detroit v. Detroit City R. Co. (C. C.),* 337.

Obligation of contract; federal court has jurisdiction to prevent city from granting to a corporation rights which interfere with privileges granted to a former company which had accepted ordinances and expended large sums. *Citizens' St. R. Co. v. City R. Co. (C. C.),* 415.

Obligation of contract granted by original charter of railway company after consolidation with other companies. *Citizens' St. R. Co. v. Memphis (C. C.),* 385.

Obligation of contract; ordinance granting company right to build and operate railway lines, and providing that city shall not grant to any other company or person privileges which may impair rights of said company, constitutes contract protected by federal constitution. *Citizens' St. R. Co. v. City R. Co. (C. C.),* 415.

Occupation of street; street-railway company chartered by special act restrained from using street granted to another company by the municipality under a general statute twenty-eight years later. *Junction Pass. R. Co. v. Williamsport Pass. R. Co. (Pa.),* 462.

Plenary power of legislature over streets not such as to authorize municipalities to devote entire width of street to railway use, regardless of property-rights of

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abutting owners. *Dooly v. Salt Lake Rap. T. R. Co. (Utah),* 513.

Route not authorized by statute; if charter is inoperative, question can only be determined in proceeding in which the state is a party. *Junction Pass. R. Co. v. Williamsport Pass. R. Co. (Pa.),* 462.

Sale of franchise to "highest bidder" means to highest bidder in money. *Hart v. Buckner (C. C.),* 430.

—"highest bidder" for street-railway franchise; sale of franchise to highest bidder "in square yards of gravel-pavement" is invalid. *Hart v. Buckner (C. C.),* 430.

Sale of franchises to another company, with agreement to transfer additional rights of way for proposed motor-line and sale of entire stock of former corporation by its officers acting as individuals, not construed as one contract so as to make such officers liable to furnish rights of way in question. *Blagen v. Thompson (Oreg.),* 530.

Street-railway company having been organized by the stockholders of another company, for the express purpose of acquiring the rights and properties of that company, was merely the old company reorganized under a new name where such company postponed its dissolution until transfer and *assumpsits* were made. *Canal & C. R. Co. v. St. Charles St. R. Co. (La.),* 555.

Time for appropriating street; delay of twenty-eight years until another company has been granted right to use street is unreasonable so as to preclude former corporation from using said street. *Junction Pass. R. Co. v. Williamsport Pass. R. Co. (Pa.),* 462.

Validity of ordinance granting to street-railway company extension of time for occupation of street may be denied by a municipality, although such ordinance had been acquiesced in for ten years, and railroad company had expended large sums.

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City of Detroit v. Detroit City R. Co. (C. C.), 887.

Tickets on cars; sale of, may be required by municipality. Sternberg v. State (Neb.), 424.

Rights of Abutters.

Additional servitude; unless imposed upon abutting owner, such owner cannot recover damages for authorized use of street by street-railway company. Paterson R. Co. v. Grundy (N. J.), 486.

Construction of third track may be enjoined at suit of abutting owners, where street is also obstructed by lines of electric light and telegraph poles, and it appears that tracks already constructed are sufficient for public convenience. Dooly v. Salt Lake Rap. T. Co. (Utah), 518.

Doubtful authority to string trolley-wires; abutting owner not restrained from cutting down wires above his sidewalk. Paterson R. Co. v. Grundy (N. J.), 486.

Easement of lot-owners entitles them to damages for obstruction of street, though soil of street is owned by another. Onset St. R. Co. v. Plymouth Co. (Mass.), 524.

Grantee of lands platted and sold as bounded by street designated and marked on the plat acquires right to the street as means of access. Dooly v. Salt Lake Rap. T. R. Co. (Utah), 518.

Injunction in favor of abutting owners to prevent invasion of rights of access and quiet enjoyment. Hart v. Buckner (C. C.), 480.

Injunction to prevent invasion of street; laches of abutting owners of acquiescence in acts of alleged owner of franchise. Hart v. Buckner (C. C.), 480.

Joint petition for damages; separate distress warrants. Onset St. R. Co. v. Plymouth Co. (Mass.), 524.

Jurisdiction of county commissioners to determine question of injunction to abutting owners by construction and operation of a street railway; finding not revised on *certiorari*. Onset St.

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R. Co. v. Plymouth Co. (Mass.), 524.

Lot owners cannot be denied the right of access, light, and air, although fee to street is in city in trust for use of public. Dooly v. Salt Lake Rap. T. R. Co. (Utah), 518.

Privileges granted to street-railway companies should be exercised so as to minimize inconvenience and danger to abutting owners. Paterson v. Grundy (N. J.), 486.

Property-rights of abutting owners and compensation for injury to their property cannot be disregarded by the legislature in granting powers to municipalities to authorize use of streets by railroad companies. Dooly v. Salt Lake Rap. T. Co. (Utah), 518.

Proximity of street railway does not entitle abutting owners to damages when the public use authorized by law does not take his property. Paterson R. Co. v. Grundy (N. J.), 486.

Railway company liable for damages to abutting owners upon by acquiring track laid by another company without any formal condemnation proceedings. Onset St. R. Co. v. Plymouth Co. (Mass.), 524.

Statute authorizing a city to "exclusively control, regulate, repair, amend, and clear the streets," and empowering it "to direct and control the location of railroad tracks and depot-ground," does not authorize city to grant railway franchise which will injure and materially depreciate the value of property of abutters. Dooly v. Salt Lake Rap. R. Co. (Utah), 518.

Stringing a single trolley-wire across and in front of lots of abutting owner, if authorized by statute, not an invasion of such owner's rights of adjacency. Paterson R. Co. v. Grundy (N. J.), 486.

Trolley-wires cannot be removed by abutting owner, when strung under authority of statute, at height of twenty-two feet. Paterson R. Co. v. Grundy (N. J.), 486.

STREET RAILWAYS—Continued.**Rights of Abutters—Continued.**

Unauthorized obstruction in street; adjacent owner sustaining special injury thereby can maintain suit for injunction against party causing the obstruction. *Hart v. Buckner* (C. C.), 430.

Electric Railways.

Measure of damages where railroad company cuts trolley-wires at such time of day as to cause great loss to railway company; trespasser *ab initio* and liable for all damages. *Saginaw Union St. R. Co. v. Michigan Cent. R. Co.* (Mich.), 481.

Motive power changed to electricity; railroad company liable for damages where it cuts away trolley-wires. *Saginaw Union St. R. Co. v. Michigan Cent. R. Co.* (Mich.), 481.

—right of street-railway company to change, where authority is given to use animal or any mechanical or other power, except the force of steam; electricity may be used. *Hudson River Tel. Co. v. Waterbury Tp. & R. Co.* (N. Y.), 469.

—presumption that legislature does not intend to limit companies to systems in use at time charter is granted. *Paterson R. Co. v. Grundy* (N. J.), 486.

—not limited by words "horse-railroad track or tracks" in company's charter, the words used being a description of the railroad to be constructed, and not of the motive power to be used. *Paterson R. Co. v. Grundy* (N. J.), 486.

—grant of right to operate cars by such motive power as company "may deem expedient and proper" gives authority to use trolley system; although grant was made to a "street and steam railroad company." *Paterson R. Co. v. Grundy* (N. J.), 486.

—Electricity may be substituted by a horse-car company as motive power when city has granted its consent to the change under its general power to regulate the use of streets. *Hudson River Tel. Co. v.*

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Waterbury Tp. & R. Co. (N. Y.), 569.

Subway commissioners; power to authorize use of trolley system, though general object of law creating commission is to require electric wires to be placed under ground. *Paterson R. Co. v. Grundy* (N. J.), 486.

Telephone company cannot complain of disturbance to its electric currents by operation of trolley system, where street railway company operates its lines in a skilful manner. *Hudson River Tel. Co. v. Waterbury Tp. & R. Co.* (N. Y.), 469.

Telephone company cannot complain of damage by electric light where its lines are constructed subsequently to that of railway company. *Hudson River Tel. Co. v. Waterbury Tp. & R. Co.* (N. Y.), 469.

Trolley-wires strung across railroad tracks at height of twenty feet; railroad company liable for damages to electric railway company caused by destroying such wires. *Saginaw Union St. R. Co. v. Michigan Cent. R. Co.* (Mich.), 481.

Collisions With Electric Cars. See **PERSONAL INJURIES, post.**

Double Use of Track.

A street railway company using the track of another company cannot complain of an assignment by the latter of its track and railway privileges. *Canal & C. R. Co. v. St. Charles St. R. Co.* (La.), 555.

Corporation exercising and enjoining right to use track of another company cannot release itself from its contract obligations on claim that agreement was *ultra vires* of the powers of its officers. *Canal & C. R. Co. v. St. Charles St. R. Co.* (La.), 555.

New Orleans recognizes the right of companies, *inter se*, to fix the value of the right to use each other's tracks. *Canal & C. R. Co. v. St. Charles St. R. Co.* (La.), 555.

Personal Injuries and Collisions.

Action against company for death of child; liability of city in giving construction company con-

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- tract to build sewer, which was alleged to have contributed to the injury. *Stanley v. Union Depot R. Co. (Mo.)*, 561.
- Attempt to escape danger; contributory negligence in choice of action when one is placed by negligence of another in situation of peril. *Lincoln Rap. T. Co. v. Nichols (Neb.)*, 584.
- Care required of young boy crossing railway track. *Lynch v. Metropolitan St. R. Co. (Mo.)*, 571.
- Child injured upon track; negligence of parent imputed to child. *Lynch v. Metropolitan St. R. Co. (Mo.)*, 571.
- Child on track; care required of railroad company to avoid injury. *Stanley v. Union Depot R. Co. (Mo.)*, 561.
- Driver of vehicle placed in state of peril by negligence of motor-man; company responsible for consequences. *Gibbons v. Wilkesbarre & Sub. St. R. Co. (Pa.)*, 600.
- Driver of wagon placed in peril by negligence of motor-man; company liable for injury to team, though peril might have been lessened by exercise of unusual courage, providing driver used care of prudent man. *Gibbons v. Wilkesbarre & Sub. St. R. Co. (Pa.)*, 600.
- Duty of conductor to keep lookout and slow up rear car when coming in sight of horses, which began to rear and jump. *Gibbons v. Wilkesbarre & Sub. St. R. Co. (Pa.)*, 600.
- Electric cars running along highway cannot be run at rate of speed incompatible with lawful and customary use by others with reasonable safety. *Newark Pass. R. Co. v. Block (N. J.)*, 590.
- Grant of franchise by city does not exempt company from liability for injury caused by its negligence. *Lincoln Rapid T. Co. v. Nichols (Neb.)*, 584.
- Injury to team by collision with street car; contributory negligence of driver in choosing

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- route when a safer street might have been taken. *Gibbons v. Wilkesbarre & Sub. St. R. Co. (Pa.)*, 600.
- Liability of city for injury to child by street car where injury was alleged to have been caused in part by action of sewer-construction company. *Stanley v. Union Depot Co. (Mo.)*, 561.
- Mutual care required of pedestrian and street-railway company. *Lynch v. Metropolitan St. R. Co. (Mo.)*, 571.
- Negligence of street-railway company; duty of trial judge in directing verdict. *Newark Pass. R. Co. v. Block (N. J.)*, 590.
- Negligence of company where person was injured by car running in direction opposite to that of car which plaintiff was attempting to board. *Forward v. Toronto (Ont.)*, 445.
- Respective duties of companies and pedestrians, where latter in exercising their lawful rights may be in a place where the exercise of lawful rights by companies may put them in peril. *Newark Pass. R. Co. v. Block (N. J.)*, 590.
- Right of pedestrian to presume that railroad company has complied with law in providing bells for team. *Lynch v. Metropolitan St. R. Co. (Mo.)*, 571.
- Sewer construction company not held joint *tort-feasor* with street railway company where child was injured on street-railway track. *Stanley v. Union Depot R. Co. (Mo.)*, 561.
- Statute providing that company shall forfeit five thousand dollars for death of person caused by negligence of any officer or employe, while running car, held to cover case where child was killed by negligence of company in neglecting to place bells on horses. *Lynch v. Metropolitan St. R. Co. (Mo.)*, 571.
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Sale of tickets on street cars may be compelled by municipality. *Sternberg v. State (Neb.), 424.*

Ticket-scalping prohibited by legislative enactment; statute constitutional. *Commonwealth v. Wilson (Pa.), 230.*

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TRUSTS AND COMBINATIONS.

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"Court." *Illinois Central R. Co. v. Crider (Tenn.), 157.*

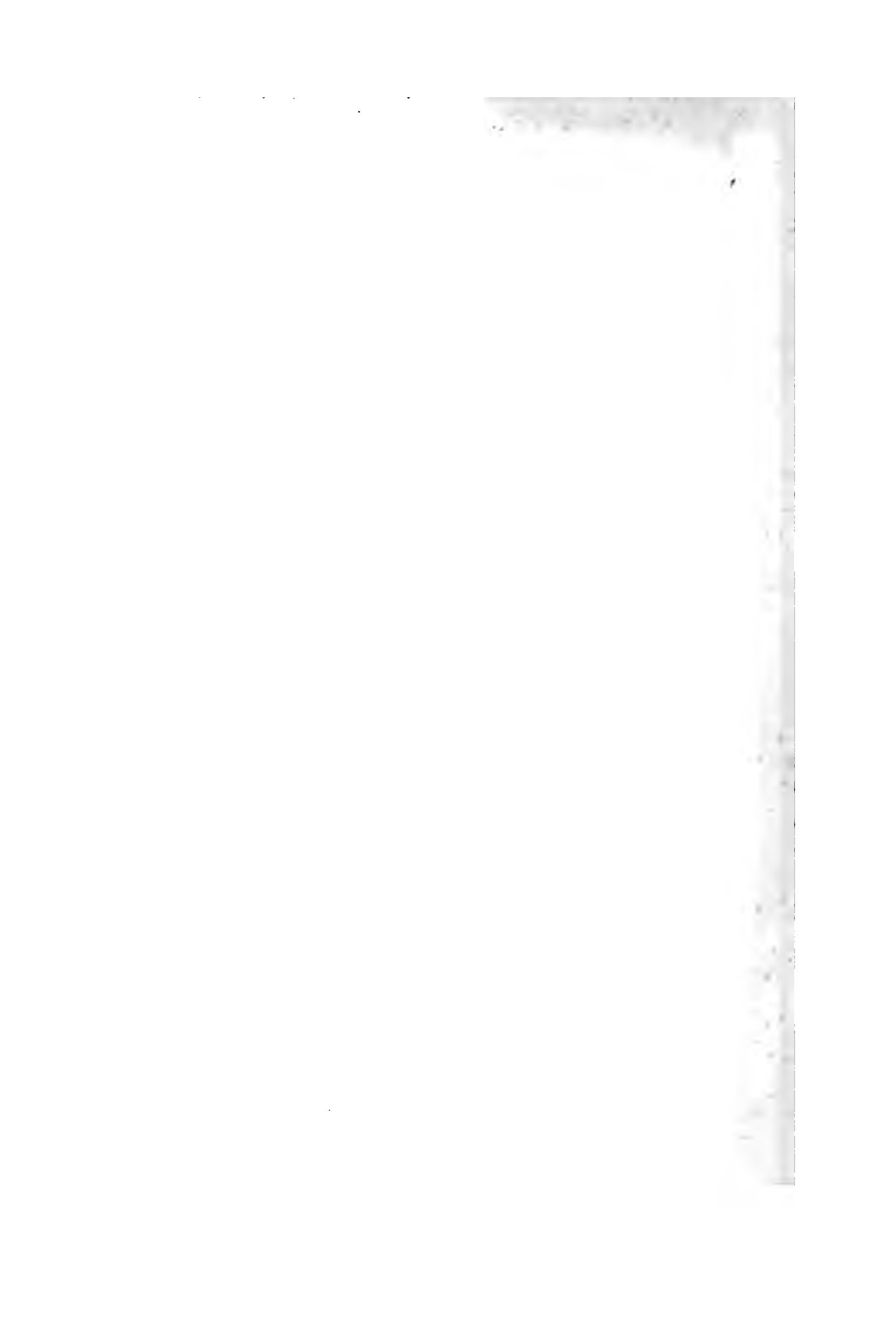
"Horse-railroad tracks." *Paterson R. Co. v. Grundy (N. J.), 486.*

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